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LAND COURT DECISIONS

MASSACHUSETTS LAND COURT DECISIONS

1898-1908

BY CHARLES THORNTON DAVIS

Judge of the Land Court

BOSTON
LITTLE, BROWN, AND COMPANY
1909

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PREFACE

The land court of Massachusetts is an innovation in judicial machinery. Originally established in 1898 to administer the land registration act, its jurisdiction has been gradually extended to cover nearly all forms of action affecting the title to land, whether brought by registration proceedings or otherwise. Within this special and peculiar sphere its jurisdiction is exclusive. Many of the questions which come before it, while likely to arise in the ordinary practice of all conveyancers and of many general practitioners, are questions as to which there seems to be a singular lack of authority to be found in the reports. The whole method of dealing with real estate in city and urban communities has within the past twenty-five years undergone a marked change. An extraordinary increase in the valuation of land in the business sections, suburban development, and the general investment of capital in real estate securities, have all combined to bring out new methods and requirements both in dealing with, and in transferring, land titles. The marketability of a title has become a very different question from that as to its actual validity. Dealers and investors in land and in real estate securities demand titles that may be handled swiftly and securely. Questions affecting their marketability frequently cannot, as a matter of practical consideration, await the delay necessary for their adjudication by the court of last resort through the channel of the regular trial courts, nor are some of them determinable by that means. Many of them come before

PREFACE

the land court, however, in the ordinary course of its business, and but few have been carried beyond it. In the division of work adopted in the land court most of these matters fell to my lot while junior judge. It was largely as an expedient to save the constant re-examination of such questions that these opinions were written. For several years some practitioners found them of sufficient value for the purpose of reference to procure copies of them as they were filed. In 1905 "The Banker and Tradesman" undertook the publication from time to time of such of them as seemed to present matter not otherwise readily available to the profession. Its files not being bound are not convenient, however, for the purpose of reference, and it is in response to requests from the present publishers and various members of the bar that this volume has been compiled.

CHARLES THORNTON DAVIS.

March 29, 1909.

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LAND COURT DECISIONS

FREDERICK LAWTON ET AL TRUSTEES, PETITIONERS.

Middlesex, December, 1898.

*Trust — Attempted Substitution by New Deed — Grant —
By One to Himself and Others in Trust; Effect.*

The property involved in this case was conveyed in October, 1893, to a single trustee, with full power of sale, for the benefit of creditors. No provision was made in the deed for the addition, substitution or succession of other trustees, nor for the delegation of the powers therein given. In November, 1893, an attempt was made to join other trustees in a new trust for creditors, with a full power of sale to be exercised within a limited period. This attempt took the form of a deed from the original trustee to himself and two others, the debtor joining in the grant, and a contemporaneous trust indenture executed by the debtor, the trustees and certain creditors. The time limited for a disposal of the property by sale has since been extended to December, 1899.

The first difficulty in this case is in the attempted substitution of a new trust in place of the one originally created.

It was held in some early English cases that where a deed of trust was made for the benefit of creditors who were not parties to the deed and had no knowledge of it, the grantor was at liberty to create new trusts. But this doctrine was early disapproved in Massachusetts. *Salisbury v. Bigelow*, 20 Pick. 174. A voluntary trust, without power of revoca-

tion reserved, cannot be determined or superseded even with the assent of the trustee and all known beneficiaries, so long as there is any vitality in the trust requiring the active discretion of the trustee, or involving the rights of possible unascertained cestuis. *Sewall v. Roberts*, 115 Mass. 262. *Lovett v. Farnham*, 169 Mass. 1. *Loring v. Whitney*, 167 Mass. 550.

Where a new trustee is appointed by the Probate Court, or in conformity with the terms of a written instrument creating a trust, he succeeds to the powers of the former trustee by operation of law under the statute. P. S. C. 141, Sec. 6. In this case, however, the statute does not apply, nor was there any power under the original instrument for substitution or delegation of the power of sale. Moreover, the legal title became entirely separated from the power. The original trustee attempted to deed direct to himself with others. That a man cannot deed to himself is elementary law. Such a deed is void. But if he deed to himself and a stranger, the deed will be construed to take effect so far as possible; the grant to himself will be void, but the stranger will take. *Shep. Touch.* 71, 82. *Perkins*, 203. In the case of tenants in common, such a deed will probably be construed as conveying to the grantees their proper proportional shares only. *Shep. Touch.* 71, *Preston's Note*. *Chamberlain v. Bussey*, 5 Greenlf. (Maine) 164, *Byam v. Bickford*, 140 Mass. 31. But in the case of joint tenants, the whole fee must pass. *Cameron v. Steves*, 4 Allen (New Brunswick) vii.

The new trustees should reconvey to the original trustee to hold under the terms of the first trust. If this power of sale determined when he conveyed to the new trustees by reason of its having been a power strictly appendant or appurtenant to his legal estate, it will be revived by the reconveyance to him. *Salisbury v. Bigelow*, 20 Pick. 174.

So ordered.

HELEN HAMLIN ET AL v. JOHN M. ALLEN.

Plymouth, June, 1899.

Way — Exception of Road from Grant Construed as Recital of Easement, Not Exception of Fee.

Title in this case is claimed under a deed from the executors of the will of one Barnabas B. Nye, to one Allen and others, of a tract of land through which ran a public road. The description in the granting clause includes the road, and at the end of the description is the expression, "with the exception of the road from wall to wall." Allen subsequently acquired the shares of his co-tenants by deeds in which the same description of the land was employed, the road being mentioned in two or three deeds in the phrase, "with the exception of the wharf road," and in the third deed in the phrase "with the width of the wharf road reserved." When Allen sold he made use of the same description, using at the end the phrase, "with the exception of the road from wall to wall." Later the road in question was discontinued as a public way by the town of Marion. The respondent claims title to the land covered by the former road, or at least a right of way over it.

It seems clear that there was no exception in this case of the fee in the land covered by the road. The road is expressly included in the description, and if it had been intended to except the fee in the road, the boundary line on the road would have run by the inner side and not by the outer side of it. The law presumes that an easement only, and not the fee, is intended by the use of the words "road" or "way" in such a case unless the contrary is clearly shown. Jamaica

Plain Aqueduct Company *v.* Chandler, 9 Allen 159. Wellman *v.* Churchill, 92 Maine 193.

In this case, however, it does not appear to have been the intention of the parties to make a technical exception at all either of fee or easement, but rather merely to note the fact, by proper recital, of a public highway running through the granted premises. There was neither reason nor propriety, in a sale for the payment of debts, for an exception of either the fee or a right of way. There was no estate to which such easement could be appurtenant. On the other hand it was a common, though inartificial, method in country conveyancing of expressing the fact of the existence of a road through the property conveyed. The repetition in later deeds of the language employed in the descriptions and recitals of earlier deeds, even though clearly inappropriate, is also a familiar feature of country conveyancing. Moreover, in the deed from Allen there was the additional motive of using the exception to relieve the grantor from his covenants both against encumbrances and of warranty. *Lively v. Rice*, 150 Mass. 171. Similar phraseology is often used for the latter purpose, and by its use the existing easement only is withheld from the operation of the deed. *Kuhn v. Farnsworth*, 69 Maine 405. *Winston v. Johnson*, 42 Minn. 398. The public easement thus excepted was terminated by the discontinuance of the road by the town in 1887.

Decree for petitioner.

R. S. Dow for petitioner.

John M. Allen pro se.

(Note: See also *Wendall v. Fisher*, 187 Mass. 81.)

WILLIAM A. BROWNING, PETITIONER.

Middlesex, July, 1899.

Seizin — Lack of Record Title — Land Registration Act.

In this case the Examiner files an adverse report. His objections to the title are twofold, first, that the record title is defective and second, that the possessory title is less than twenty years old. Both objections are well founded, and under ordinary circumstances either would be fatal to the petition. The circumstances of this case are very unusual however. The facts are as follows:

Good title to locus is found in 1850 in one Farnsworth. He went into insolvency in 1852 and title passed to his assignee one Boynton. Both Farnsworth and Boynton then disappeared and diligent search has failed to disclose any trace of either of them except as to one distant relative of Farnsworth. The administration of insolvency at that date was in the hands of Commissioners, some of whom returned their dockets and papers to the subsequently established Insolvency Court, while others did not. No records or papers in the Farnsworth case have been preserved in Suffolk County, and all of Mr. Commissioner Allen's records not now in the insolvency office are said to have been destroyed. All record of the names or claims of the Farnsworth creditors has therefore been lost.

At the time of the Farnsworth insolvency the assessors of Somerville kept no locality index or Street book; neither did they make any systematic examination of the records at the Registry of Deeds, but relied upon previous tax bills and such knowledge of local transfers as they themselves pos-

sessed. They therefore knew nothing of the insolvency of Farnsworth who was a non-resident, but continued to assess the property to him, and, when the taxes were not paid, the collector sold it as his estate. This sale was invalid for various reasons, and no possession seems to have been taken by the purchaser or those holding under him. The tax title, such as it was, passed to one Ranney in 1858, and in 1895 the petitioner (or the estate which he represents) in the course of acquiring all that could be found in the nature of a record title, secured a release from him. No taxes had been paid by Ranney on the property for at least twenty years.

The property at the time it was owned by Farnsworth was situated at the edge of a swamp and at the end of an uncompleted street. It formed a portion of one lot on a large tract which had been plotted into house lots, many of which existed upon paper only, and was of little value. No one was in actual occupation of it until about thirteen years ago. The evidence tended to show that from the abandonment of the property by the Farnsworth estate in 1854 until the streets were actually laid out and the land became marketable in 1872, the assessors did not attempt to tax it at all. Then efforts were made to find an owner, and after several unsuccessful attempts to collect from the estates of former owners, and two invalid tax sales, it was assessed in 1881, there being no occupant, to "owners unknown," and on the tax sale following this assessment, the subsequent tax titles based upon it, and the possession taken thereunder, the petitioner relies.

It is contrary alike to principle, policy and practice under the land registration act that a bad or defective or incomplete title should be brought into this Court, and decreed to be good. Defects of record, not defects of title are curable here. On the other hand it is one of the purposes of the registration law that the real title should be adjudicated upon, established and made a matter of record.

Good titles exist in Massachusetts which yet do not appear of record anywhere. *Arnold v. Reed*, 162 Mass. 438. A man who is in actual possession of land under a claim of ownership where there is no one who can lawfully dispute his right to so hold it, has every essential element of title under our law.

The old Anglo Saxon theory, or rather fact, of seizin was a fundamental principle of the common law, and is none the less a living part of the real estate law of to-day because in the daily practice of conveyancers it has become so obscured by the intricacies and ramifications of our record titles, that as Sir Frederick Pollock says "It is possible for even learned persons to treat it as obsolete." It is the right to immediate possession, not the ultimate determination of true ownership, with which the common law is concerned. The only proper question for the conveyancer is or should be "what is there of record to successfully interfere with the person now in possession and claiming title."

The Roman theory of true ownership has but little place in our law, in spite of the increasing and inevitable tendency of conveyancers under the present system of examining titles by searching the records, to drift, consciously or unconsciously, toward the principles of the Roman law, and to enquire first as to theoretical true ownership, and last, if at all, as to the rightfulness of the actual possession. It is the recognition and protection and pacification by the law of the righteous physical control actually existing, that constitutes "title" whether at common law or under our registration act. "The person in possession is *prima facie* the owner, and the only use of investigating the title is to show the nature of his estate. Most land owners have no knowledge what their title is, all they know is that they and those through whom they claim have had possession," says Sir Howard Elphinstone in an article on the English registration act. The common law has never had a procedure an-

swering to the Roman Vindication. He is the true owner who has the right to possess. *Wellington v. Gale*, 13 Mass. 483. "Actual enjoyment and control of land or goods (and) the recognition of peaceable enjoyment and control as deserving the protection of the law, are," says Sir Frederick Pollock in his address before the alumni of the Harvard Law School, "the points that stand in the fore front of the common law when we take it as presented by its own history and in its native authorities."

So far as the record title outstanding in the Farnsworth assignee is concerned, an assignee in insolvency is barred by statute from any proceeding at law or in equity touching property or right after six years from the time when the same might have been brought. Acts of 1895, Chap. 432. Moreover, as against both the assignee and Farnsworth the petitioner has, beside his tax titles, a decree under P. S. C. 176; though as to this last the examiner questions, with some reason, the value of a decree in personam against parties not within the jurisdiction of the Court.

On the whole then we have a possession peaceably and lawfully acquired; no valid adverse claims discoverable; an honest, and so far as possible a successful, attempt to get in all outstanding record interests; and an improvement of the property in the interests of the community; in fact everything except a "record title," and this the petitioner now seeks. We think him entitled to registration.

Decree accordingly.

Note — See *Percival v. Chase*, 182 Mass. 371 at 376, (1902). *Hillis v. O'Keefe*, 189 Mass. 139.

WILLIAM H. WHITMAN, PETITIONER.

Middlesex, July, 1899.

Estoppel — Quit-Claim Deed — After-Acquired Title.

This case presents the question whether by the giving of a quit-claim deed an estoppel is created so that title subsequently acquired by the grantor will enure to the grantee.

The facts are simple. The petitioner claims under a quit-claim deed from one Monahan. The title at the time of this deed was outstanding in one Ross, and Monahan had undertaken to procure a conveyance from Ross through himself to the petitioner. Subsequently Monahan obtained a deed from Ross to himself, and it is asserted that title thereunder remained grounded in Monahan. Both deeds were quit-claim deeds in the ordinary form, using in the granting clause the phrase "remise, release and forever quit claim," and containing the usual "limited" covenants against encumbrances made or suffered by the grantor, and of warranty against all persons claiming by, through or under him, but against none other.

The principle, the scope and the effect of the doctrine of the enuring to a grantee of a later acquired title by virtue of an estoppel against the grantor and his successors has been the subject of varied and more or less conflicting decisions. Rawle, Covenants for Title, Chap. 11. *Russ v. Alpaugh*, 118 Mass. 369. *Knight v. Thayer*, 125 Mass. 25. *Ayer v. Brick Co.*, 159 Mass. 84.

The doctrine has been one of gradual growth and development, and the reasoning employed by the courts from time to time as the principle has become formulated by the decisions, has necessarily in no one case been either conclusive or

finally restrictive, nor has it been so intended. The doctrine is essentially an equitable one; "the unconscious administration of equitable principles through the medium of common law forms." Rawle, Sec. 240, note. At common law the operation of this doctrine was limited to conveyances by feoffment, fine and recovery and the like, which operated by actual transference of the estate, and to rebutter under a warranty, by way of preventing circuity of action. Rawle, Section 246. Perkins, Section 65. *Bates v. Norcross*, 17 Pick. 14. *Doane v. Willcutt*, 5 Gray, 328. Both grounds are too narrow, however, to support the doctrine as developed by the modern cases. It was early extended to conveyances by way of bargain and sale, and beyond the operation of mere avoidance of circuity of action. But it is argued that it does not extend so far as to a quit-claim deed. Mr. Rawle states this proposition flatly. "A mere release, or a deed of quit claim, will not have the effect of estoppel." Rawle, Section 247. Mr. Crocker similarly limits the effect of the estoppel created by the limited covenant used in a quit claim deed. *Notes on Common Forms*, 4th ed. p. 133. I think, however, that such a limitation is not justified either by the cases cited by Mr. Crocker or by the principle of law that underlies them. The principle involved is founded, not on the form of the instrument or the language of the covenant, but on the intention of the parties and the equities of the case.

Where the deed purported and was intended to convey only the title and interest then in the grantor, there is no basis for estoppel; and such was the situation in the Massachusetts cases cited by both Mr. Rawle and Mr. Crocker. *Comstock v. Smith*, 13 Pick. 116. *Blanchard v. Brooks*, 12 Pick. 47, 66. *Wight v. Shaw*, 5 Cush. 56. *Miller v. Ewing*, 6 Cush. 34. *Doane v. Willcutt*, 5 Gray, 328. *Weed Co. v. Emerson*, 115 Mass. 554. This point is well brought out by Mr. Perkins in his edition of Pickering. *Soames v.*

Skinner, 3 Pick. 52, 59, note. The head-note in *Comstock v. Smith* goes far beyond the decision in that case. The old leading case of *Right v. Bucknell*, also cited by Mr. Rawle, rested upon the ground that the lease was merely of such title as the grantor then had, having none, while the release clearly recited the grantor's title as being a legal or equitable right, and that, therefore, the allegation being in accordance with the facts, no ground for estoppel existed. *Right v. Bucknell*, 2 Barn & Adolp, 278. None of the above cases usually cited to the proposition that there is no estoppel under a quit-claim deed, go beyond the limits of the ordinary rule that where there is an estate granted to which the covenant or estoppel would naturally apply, it will be limited to that estate, such being the obvious intent of the parties. *Blanchard v. Brooks*, *supra*. *Miller v. Ewing*, *supra*. *Doane v. Willeutt*, *supra*. *Tarbell v. Page*, 155 Mass. 256.

The estoppel is not, however, necessarily limited to the extent of the estate conveyed by the granted clause of the deed. *Trull v. Eastman*, 3 Met. 121. *Russ v. Alpaugh*, 118 Mass. 369. *Ayer v. Brick Co.*, 157 Mass. 57. *Ayer v. Brick Co.*, 159 Mass. 84. There need not even be a covenant at all. "Whatever be the form or nature of the conveyance, if the grantor sets forth by way of recital or averment, either in express terms or by necessary implication that he is seized or possessed of a particular estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterward denying that he was so seized and possessed at the time he made the conveyance." *Van Rensselaer v. Kearney*, 11 How. 297. *Nicholson v. Caress*, 45 Ind. 479. "The estoppel is to effectuate the real intent of the parties, which was to convey the real true title to the land." *Bennett v. Waller*, 23 Ill. 97, 183. "The reason why the estoppel should operate is that such was the obvious intention of the parties." *Blake*

v. Tucker, 12 Vt. 39. *Ayer v. Brick Co.*, 159 Mass. 84, 87.

In the early days the quit-claim form of deed and covenants was seldom used except for a mere release of "right, title and interest," and most of the decisions that touch the question in the case at bar are based on the fact of such a grant, and not on the effect of a quit-claim deed as such. This practice still prevails to a very considerable extent in some of the counties. In the eastern part of the State, however, the quit-claim deed has come into general use, and both by statute and decision has been made equally effective with the full warranty deed to pass "all the estate which can lawfully be conveyed by deed of bargain and sale." P. S. Chap. 120, Section 2. *Conolly Petitioner*, 168 Mass. 201. In the case at bar the representation necessarily implied from the grant was a representation of title in the grantor. The estoppel is "determined by the scope of the conventional assertion." *Ayer v. Brick Co.*, 159 Mass. 84. In a full warranty deed there may be a limited grant, coupled with an unlimited warranty. In such case the estoppel arises under the covenant alone. In a quit-claim deed the force of the covenant, apart from the necessary effect of the conveyance, will not be sufficient of itself to create an estoppel by virtue of which a subsequently acquired paramount estate will enure to the grantee. In *Jones on Real Property*, Section 992, it is said that "aside from the estoppel arising from the conveyance of a particular estate, only a warranty deed operates to transfer an after acquired title of the grantor. A quit-claim deed cannot have that effect." The phrase "aside from the estoppel arising from the conveyance" is clearly intended to qualify both statements.

In the case at bar the estoppel arises from the grant. The intention of the parties, in fact the whole object of the transaction, was to convey the "real true title," which was the title of Ross, through Monahan to the petitioner. Monahan is estopped by his grant. Decree for the petitioner.

MARY C. ROBINSON *v.* ANDREW J. CHURCH.

Suffolk, September, 1899.

Tax Title — Registration — What Proof Necessary.

This is a petition for registration of a tax title. The case having been brought as a test case to determine the status of tax titles under the land registration act, the attorney general has appeared on behalf of the public and the matter has been very fully argued on his part, as well as by the parties immediately in interest.

Under the recent decision in *Burke v. Burke*, where one seeks to show that the title of another has passed to himself by virtue of a tax sale, he must prove, by evidence outside the recitals of the tax deed, that everything has been done which the statute calls for as a condition precedent to the transfer of the property. *Burke v. Burke*, 170 Mass. 499.

The question of what things it is necessary to prove as being essential to the validity of a tax sale, is a question, however, on which there is not only a marked conflict of authorities in different jurisdictions, but one as to which there has been of recent years a decided development and change in the tendency of the law, both statutory, and by judicial decision, in Massachusetts. The number of tax sales made each year has greatly increased, and the provisions of the statutes affecting them have become both numerous and complicated. While a few years ago the loss of an estate by tax sale was an unusual event exciting general notice in the community, to-day about two million dollars' worth of property (by assessed valuation) is sold for taxes in the city of Boston alone.

The whole tax proceedings from the beginning to the end are statutory, and it is of great importance to the rights of property that positive regulations of statute which authorize its seizure and sale without the consent of the owner should be strictly complied with. *Alexander v. Pitts*, 7 Cushing, 503.

In some jurisdictions proof of a strict and literal compliance with every requirement of statute, seems to be necessary to the validity of a tax title. *Brown v. Wright*, 17 Vt. 97. *Polk v. Rose*, 25 Maryland, 153. *People v. Hastings*, 29 Cal. 449. *Payson v. Hall*, 30 Maine, 319. *Brevoort v. Brooklyn*, 89 N. Y. 128.

On the other hand it is necessary to the administration of government that taxes should be collected, and the tendency of modern cases is to make tax sales reasonably practicable. As said by Judge Cooley, the time has gone by when the proceedings of tax officers are to be scrutinized with microscopic nicety. The policy of the law is for the collection of taxes, with an appeal to the courts to regulate errors or to compensate for any injuries. *Stockle v. Siblee*, 41 Mich. 615.

It is urged both for the attorney general and the respondent Church that proof should be required from the petitioner of compliance with a long array of technical steps and statutory provisions, and in support of such contention citations are offered from the text books, from decisions in other states, and from early cases in Massachusetts. It is not advisable to consider these in detail. It is sufficient to note first, that in Massachusetts many of the statutory requirements have long been held to be directory only, and second, that many matters which under the early decisions would avoid a tax sale, since the statute of 1859 are no longer sufficient for that purpose. *Torrey v. Millbury*, 21 Pick. 64. Acts of 1859, c. 118; Acts of 1888, c. 390, sec. 94. *Cone v. Forrest*, 126 Mass. 97.

In addition to his general contention as above stated, the respondent Church makes certain specific requests for rulings. He contends that proof must be made that the board (of aldermen) levying the tax were duly elected and qualified. This matter, however, is one that is altogether too remote. It is the duty of the assessors to make assessment, and of the collectors to make collection, of the public taxes as certified to them from the respective public bodies granting, authorizing and requiring the tax. That the respective legislative county and city authorities who constitute for this purpose not the officials by whose acts the land owner is deprived of his estate, but the public government itself, were duly elected and qualified, must be presumed. *Alvord v. Collin*, 20 Pick. 418. *Williams v. Lunenburg*, 21 Pick. 75. *Sprague v. Bailey*, 19 Pick. 436. *Blackstone v. Taft*, 4 Gray, 250.

The respondent also contends that it must appear that the tax was levied for a lawful purpose, and that all the items of the appropriation were authorized by law; and in support of his contention cites among other early cases: *Libby v. Burnham*, 15 Mass. 144. *Stetson v. Kempton*, 13 Mass. 272. *Goodrich v. Lunenburg*, 9 Gray, 38. We think that this is no longer the law however. The statute of 1859 was evidently passed in consequence of the decision in *Goodrich v. Lunenburg*. Under the provisions of that statute illegality in the assessment or apportionment of a tax does not invalidate the sale. *Cone v. Forrest*, 126 Mass. 97. *Southworth v. Edmands*, 152 Mass. 203. The word "illegality" in the Act of 1859 has however by gradual transition become "irregularity" in the present statute. In the Act of 1859 c. 118, sec. 4, it is provided that "whenever, by any erroneous or illegal assessment or apportionment of taxation, any party is assessed more or less than his due and legal proportion, such tax and assessment shall be void only to the extent of the illegal excess of taxation, whenever such exists; and no

party shall recover in any suit or process based upon such error or illegality, greater damages than the amount of such excess." In the revision of 1860 the provisions of the Act of 1859 were divided between G. S. chap 11, sec. 54, and chap. 12, sec. 56. By G. S. chap. 12, sec. 56, it was provided that "damages based upon any error or illegality in the assessment or apportionment of a tax shall not be greater than the excess of the tax, and no sale shall be avoided by reason of any such error or irregularity." P. S. chap. 12, sec. 84 followed the language of G. S. chap. 12, sec. 56. By sec. 94 of Chap. 390 of the Acts of 1888, the word "illegality" in the clause relating to damages is changed to "irregularity," so that in both places where the word "illegality" appeared in the 1859 statute, the word "irregularity" is used in the present one. It was expressly held in *Cone v. Forrest*, however, that no change in the law was effected by the change in phraseology in the revision of 1860, and I think that the same remains true under the revision of 1888, and that we are still governed by *Cone v. Forrest*, and *Southworth v. Edmands*.

The evidence in this case shows that the assessor's lists were taken in books, and these books while in process of copying by the assessor's clerks were kept in the assessor's office where they could be seen by any one on inquiry or demand, but could not be seen otherwise; the copies of these books constituted the list committed to the collector, and, after the commitment of the copied lists to the collector, and not until then, were the originals deposited and set apart for public inspection; these lists were not in the form called for by Public Statutes, chapter 11, sections 50-52. On this evidence the respondent asks for a ruling that the sale was void. The particular provisions of the statutes in question must be deemed to be directory only. They were complied with in substance. Exact and literal compliance is not essential to the validity of the sale. This matter is fully covered by the

cases: *Sprague v. Bailey*, 19 Pick. 436. *Torrey v. Millbury*, 21 Pick. 64. *Mass. General Hospital v. Somerville*, 101 Mass. 319. *Westhampton v. Searle*, 127 Mass. 502. *Noyes v. Hale*, 137 Mass. 266. *Lowell v. County Commissioners*, 152 Mass. 372.

A more difficult matter is the request for a ruling that the petitioner must prove that the officers immediately exercising the necessary statutory authority were officers *de jure*. On this point there is a distinct conflict of authority. The general principle is well established that so far as the rights of third persons or of the public are concerned proof that public officers are officers *de jure* need not be made, but the acts of officials *de facto* are valid. An exception to this rule exists in some jurisdictions as to a sale of land for payment of taxes. Mr. Blackwell thinks that the better opinion is, that "where a tax is assessed and the proceedings are conducted by officials *de facto* the sale will be maintained." Blackwell on Tax Titles; Section 185, and cases there cited. So in New Hampshire, it is sufficient that they be officers *de facto*. *French v. Spaulding*, 61 N. H. 395. In Maine on the contrary the officers must be officers *de jure*. *Payson v. Hall*, 30 Maine, 319. *Dresden v. Goud*, 75 Maine, 298.

In Massachusetts no rule has of late years been definitely enunciated. In the earlier case, however, the *de jure* rule as to tax sales was clearly recognized. *Alvord v. Collin*, 20 Pick. 418; and earlier cases there cited. *Sprague v. Bailey*, 19 Pick. 436. *Goodrich v. Lunenburg*, 9 Gray, 38. This was subsequently modified by the Act of 1859, as to errors and illegalities in the assessment or apportionment of the tax; but except as so modified, still stands unchanged. It seems to me, therefore, contrary to Mr. Blackwell's view, that the same principle must control throughout, and that there can be no different rule for proof of authority of the officer, from that controlling other proof of compliance with the provisions of the statute. The criterion in both cases is whether

the act as to which the statutory provision applies, is an act that immediately affects the individual citizen whose property is taken from him under the authority of the statute.

As stated in *Torrey v. Millbury*, it is not easy to distinguish between some of the statutory provisions which are directory and some which are mandatory. I think, however, that the general rule may be deduced from the cases, that those provisions which are intended for the security and benefit of the individual citizen, whose land is taken from him without his consent, are mandatory, while those which are intended to secure regularity and uniformity in the proceedings of assessors throughout the state, are merely directory. *Bemis v. Caldwell*, 143 Mass. 299. *Southworth v. Edmands*, 152 Mass. 203. *Lunenburg v. Chair Company*, 118 Mass. 540. This rule may be made still more definite by limiting it further to such provisions only as immediately affect the individual citizen whose property is taken from him under the authority of the statute.

Applying the rule of law as above developed to the evidence offered in this case, I think that to establish the validity of a tax title there must be proved:

First — The election and qualification of the assessors.

Second — Notice to citizens of impending assessment as by the ordinary notice to bring in their lists.

Third — Receipt by the assessors of the requisition for taxes.

Fourth — Assessment of locus to the proper person.

Fifth — Commitment to the collector of the tax lists.

Sixth — That the collector was an officer de jure.

The above provisions being “intended to secure equality of taxation and to enable the citizen to ascertain with reasonable certainty for what estate he is taxed,” are, therefore, essential to the validity of the sale. *Bemis v. Caldwell*, 143 Mass. 299.

All other provisions prior to the demand by the collector

upon the individual owner, appear to be directory only, or made unessential under the express provision of the 1859 statute.

All provisions after and including the demand are mandatory; and proof of strict compliance therewith by duly authorized officers must be made. *Alexander v. Pitts*, 7 Cushing, 503. *Harrington v. Worcester*, 6 Allen, 576. *Knowlton v. Moore*, 136 Mass. 32. *Lunenburg v. Chair Company*, 118 Mass. 540. *Burke v. Burke*, 170 Mass. 499.

By strict compliance is meant a substantial and reasonably exact compliance. A precision or nicety of language which it would be unreasonable to expect will not be required. *Adams v. Mills*, 126 Mass. 278. *Pixley v. Pixley*, 164 Mass. 335.

Decree for petitioner.

W. O. Childs for petitioner.

F. A. North for Attorney General.

G. W. Bartlett for respondent Church.

JOSEPH F. WILSON, PETITIONER.

Suffolk, September, 1899.

Presumption of Death — Registration of Title — Concurrent Proceedings in Probate Court.

Title in this case rests on the presumption of death of owners of undivided portions of the premises. The facts are as follows:

James Harrington, Sr., died seized of locus in 1856, intestate, leaving a widow, since deceased, and three children, James, Jr., William and Mary, all of age. James, Jr. went to California in 1849, but returned shortly after his father's death to look up his share of the estate. The property was then of very little value, and James went back to California, and has never been heard from since. He was at the time of his disappearance unmarried. William was a sailor. He went to sea in 1879 and has never been heard of since by any member of his family. He left a wife who is still living, but no children. Just prior to his disappearance in 1879, William executed a deed of his share of locus as an heir of his father, and title under this deed, as well as under a deed from Mary in 1882, of all her interest, including any rights as heir to her brothers, is now vested in the petitioner.

On these facts the petitioner urges that he has established a presumption of death as to both James and William that is binding upon this court.

The presumption of death from seven years absence is a doctrine of comparatively recent origin and is generally cited in the books merely as affording a justification for a

finding of fact. If it has developed, as the petitioner urges that it has, into a presumption that is conclusive upon the court, then it has become a matter of very serious import in cases like the one now at bar. The petitioner cites Thayer on Evidence, and Stockbridge, Petitioner, 145 Mass., 517, in support of his proposition.

Professor Thayer says: "The rule about a seven years absence, coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty . . . passes into the form of an affirmative rule of law requiring that death be assumed under the given circumstances. This is a process of judicial legislation, advancing from what is a mere recognition of a legitimate step in legal reasoning to a declaration of the legal effect of certain facts." Thayer, Evidence at Common Law, 323.

In the case of Stockbridge, Petitioner, decided in 1888, an alleged legatee had left his wife and family in 1871 to seek work. His wife heard from him twice within a few weeks after his departure, but, although she made enquiries, never heard of him again. The testator died in 1881. The "legacy" had been deposited in a Savings Bank under a decree of the Probate Court, and the petitioners asked that it be paid to them as the children of a predeceased legatee, under the provisions of P. S. C. 127, Sec. 23. The Probate Court denied the petition. The Supreme Judicial Court reversed this decree, and ordered payment as prayed for, declaring that it should now be taken for granted that the said legatee died before the testator. Stockbridge, Petitioner, 145 Mass. 517. Re Stockbridge was, however, a Probate appeal. The matter before the Supreme Court was a question of fact, not a question of law. The decision rests expressly upon the ground that the presumption is a presumption of fact, a presumption which in the absence of anything to the contrary is sufficient to justify a finding of death.

The decree of the Probate Court was reversed, but it was reversed in consequence of a different finding of fact in the higher Court of Probate to which the whole matter was transferred on appeal. This is a very different matter from a decision that the presumption was one binding upon the Probate Court as matter of law, "requiring that death be assumed under the given circumstances."

I do not think that the Courts have gone to the extent indicated by Professor Thayer. It is a very long step from evidence that will "justify a finding," to a presumption of law which will compel one, or justify the ordering of a verdict for the plaintiff. The Court or jury have a right not to believe evidence, and to refuse to find a fact. *Merchants Bank v. Haverhill Iron Works*, 159 Mass. 158. *Revere Bank v. Morse*, 163 Mass. 383. A presumption of law is a conclusive, arbitrary rule, regardless of, and in some cases entirely contrary to, the facts. As in *Regina v. Phillips*, 8 C. & P. 736. *Regina v. Jordan*, 9 C. & P. 118. The presumption of death, on the other hand, is not absolutely conclusive, and cannot be made so. *Carr v. Brown*, 20 R. I. 215. *Scott v. McNeal*, 154 U. S. 34.

The general statement of the law in the text books, and the effect of all the decisions down to at least a very recent date, has been merely that the presumption will support a finding of death; and that the presumption is rebuttable, or, as Greenleaf puts it, "disputable." Greenleaf on Evidence, Sect. 33 and 41. Woerner on Administration, 443. Stephens Dig. Evidence, 99. It may be rebutted by mere hearsay. *Dowd v. Watson*, 105 N. C. 476. The attending circumstances must be reasonable. *In re Phenex Trusts*, L. R. 5 Ch. 139. *Dickens v. Miller*, 12 Mo. App. 408. And, in spite of the apparent paradox, it has been held to depend somewhat on the lapse of time; the presumption not being entertained on a question of marketability of title on a lapse of twenty-five years, as distinguished from a case where the

absence had been for forty years. *Vought v. Williams*, 120 N. Y. 253. "It is to be remembered that, at the most, the presumption of the continuance of life is merely a presumption of fact, which is subject to be controlled by facts and circumstances and other legitimate evidence. It is a presumption by no means of equal strength at all times and under all circumstances." *Hyde Park v. Canton*, 130 Mass. 505. And see *Jochumsen v. Suffolk Bank*, 3 Allen 87; *Flynn v. Coffee*, 12 Allen 133.

So far as William alone is concerned, we might further rest our decision on the ground that we are not satisfied that "sufficient enquiry and search for the man was made among all those who, if he was alive, would be likely to hear from him." *Prudential Ass. Co. v. Edmonds*, L. R. 2 App. Cas. 487. *Stockbridge, Petitioner*, 145 Mass. 517.

The petitioner objects that the suggestion of this Court that he proceed in the Probate Court under the absentee statute, imposes a useless burden upon him, and is a mere shifting of the responsibility upon another Court which has not as full jurisdiction in the matter as this Court has. We think, however, that under the insurance clauses of the Land Registration Act the Commonwealth assumes a very real risk, and is entitled to every reasonable protection, and that on a suit for damages against the Commonwealth under the insurance clause, a man who had neglected his home, friends, family and property so far as to allow an adjudication of his death, and sale of his property in the Probate Court under the provisions of the absentee statute, would receive much less consideration than one who had lost an undivided interest merely under the ordinary proceedings of land registration.

Case suspended to await further proceedings.

Note — In the course of the further proceedings in this case, William Harrington was found alive, and in Boston. See also *Hopfensack v. New York*, 173 N. Y. 321 (1903) accord.

FRANK HEMENWAY, PETITIONER.

Middlesex, January, 1900.

Deed — Habendum Repugnant to Grant — How far Rejected.

Title in this case comes under a deed in which the grantor is Thomas Dearing, the consideration is recited as paid by Isaac Woodward and John P. Brown, the grant is to "said Woodward and Brown," without any words of inheritance, and the habendum is to "said Dearing his heirs and assigns." The Examiner is of the opinion that the deed conveyed to Woodward and Brown an estate for their lives only, and cites *Palmer Savings Bank v. Ins. Co.*, 166 Mass. 189, 196.

We do not think however that the dictum of Field C. J. in that case covers the present situation. Nor does it seem to us that that dictum was either necessary to the decision, or intended for anything more than a passing notice of the point in the course of a long and elaborate opinion on a wholly irrelative proposition of law. The facts in the *Palmer Bank* case, however, fully cover the case at bar; a grant without words of inheritance, followed by an habendum to the grantor, instead of the grantee, and "his heirs and assigns." The court says in the *Palmer Bank* case, "If the habendum be rejected as inconsistent with the grant, then the deed conveyed the property to the grantee for her life." But the question whether the whole habendum must necessarily be rejected was not considered. In *Jones on Real Property* the proposition is laid down that "so far as an habendum is inconsistent with the declaration in the premises, it must be rejected." *Jones, Real Property*, Sect. 564.

Words of inheritance in the habendum, where there are none in the granting clause, do not make the habendum inconsistent or repugnant. On the contrary, that is what the habendum is for. Perkins, P. B., 174. *Riggin v. Love*, 72 Ill. 553.

“The office of the premises in a deed is to state the parties, the description of the property and the grant; that of the habendum, to limit the estate with certainty.” Baldwin’s Case, 2 Coke Rep. 23, Thomas’ Notes.

The only thing inconsistent and repugnant in the deed under consideration, is the obvious error of the scrivener in inserting the grantor’s name in the habendum instead of the grantees’. That must be rejected, because it is contrary to the grant. But the habendum shows clearly that what was intended to be granted was a fee, not an estate for the life of the grantees.

The whole instrument is to be so construed without regard to its technical parts as to give effect if possible to the intention of the parties. *Bridge v. Wellington*, 1 Mass. 219. I think that the deed conveyed an estate in fee.

Decree for Petitioner.

BENJAMIN LANCY *v.* ABINGTON SAVINGS BANK.

Suffolk, March, 1900.

Tax Title — Assessment to Record Owner — Notice to Owners — Purchase by Person Assessed — Right of Redemption.

On October 14, 1895, the record title to the land described in this application for registration was in Peter P. Veale, subject, first, to a tax deed to the petitioner dated October 18, 1893; and, second, to a mortgage to the Abington Savings Bank. The tax deed was released by deed from the petitioner to Veale, dated and acknowledged August 4, 1894, and recorded June 6, 1895.

The taxes for the year 1894 were assessed to petitioner as owner, and the tax bill and demand for payment thereof was duly sent to and received by him. On October 14, 1895, the premises were sold for non-payment of said taxes of 1894, and bid in by the petitioner in the name of his son, Benjamin C. Lancy. The purchase price was subsequently paid to the City Treasurer by the petitioner, and a tax deed delivered to him in the name of Benjamin C. Lancy, grantee. The petitioner subsequently paid the taxes for 1895, 1897 and 1898, and always treated the property as his own property standing in the name of his son, and January 16, 1900, he received a quit-claim deed from his son, paying therefor only a nominal consideration. The Abington Savings Bank had no actual notice of said tax sale of 1895 until May, 1899.

On June 3, 1896, the Abington Savings Bank made an entry to foreclose said Veale mortgage, whereof a certificate was duly recorded, and on the same day sold the property at

foreclosure sale under the power of sale mortgage, and became itself the purchaser through one Sproule, as conduit. The taxes for 1896 were paid both by said bank and by the petitioner, and the tax paid by the petitioner was refunded to him by the city because of said payment by the bank.

As preliminary to the tax sale of 1895 it was proved from the records of the Board of Assessors of the city of Boston that the board voted that 80,000 "Notices to bring in lists" should be printed and distributed to taxpayers, and it appeared from the testimony of two clerks that "the notice" was advertised in all the daily newspapers. No other evidence of the character or contents of this notice was introduced.

No evidence of the validity or nature of the petitioner's title to the property on May 1, 1894, was introduced other than a certified copy of the tax deed to him of October 18, 1893, duly recorded October 21, 1893, and a release thereof by him dated August 4, 1894, and recorded June 6, 1895. The examiner's abstract and report show further that there was no other record affecting this tax deed, and that it constituted the petitioner's only claim of title on May 1, 1894.

All facts other than above stated essential to the validity of a tax sale were duly proved by the petitioner.

On the above facts the respondent contends (1) that the taxes for 1894 were not assessed to the proper person as owner, (2) that there was not proper notice to citizens that taxes were to be assessed, (3) that the purchase at the tax sale of 1895 merely constituted payment of the taxes due and (4) that the respondent is entitled to redeem.

1. The respondent argues that the mere introduction of the tax deed of 1893 "proves nothing." *Burke v. Burke*, 170 Mass. 499. *Robinson v. Church*, Land Court Decisions, *supra* p. 13. But the tax deed of 1893 is not introduced as evidence either as to the facts stated in its recitals or as to the validity of the title to which it is the muniment. It is

evidence together with the rest of the record merely of a tax deed on the land in controversy, the record title to which deed was in the petitioner on May 1, 1894. The "proper person" to whom the petitioner must prove that the tax of 1894 was assessed was "the person appearing in the records as owner thereof on the first day of May." Pub. Stat., Chap. 11, Sect. 13. The record holder of a tax deed on that date is such person. *Butler v. Stark*, 139 Mass. 19. (Note: — And see *Roberts v. Welsh*, 192 Mass. 278.) The validity or invalidity of the record title is not a matter with which the assessors are in any way concerned. The record owner "shall be held to be the true owner" for the purpose of taxation, regardless of the truth. And an assessment to the real owner instead of the record owner is invalid. *Southworth v. Edmands*, 152 Mass. 203. (Note: — And see *Hough v. Adams*, 196 Mass. 290, at 293.)

2. Before proceeding to make assessments the assessors must give reasonable notice to the inhabitants. It is the mere fact that notice was given that is material. Notice by general advertisement is sufficient. *Huling v. Kaw Valley R. R.* 130 U. S. 559. *Lent v. Tillson*, 140 U. S. 316. The notice need only be such notice as is appropriate to the nature of the case. *Hagar v. Reclamation District*, 111 U. S. 701. In this case the notice was "the notice to bring in lists," required by Public Statutes, Chap. 11, Section 38, and was sufficient.

3. Payment of the purchase price of the 1895 sale by the petitioner did not constitute merely a payment of his debt. It was not "his tax." Whatever may be argued as to the ethics of his conduct, he was under no legal obligation to heed the demand for payment made on him by the collector. The constitution and the statutes recognize two distinct classes of taxes, taxes to persons and taxes on property. This was a tax on property. It might be assessed to a bare record owner, to a mere occupant, or to a dead man. Even if assessed to the owner, demand for payment may be made on an occupant.

Where it is "his tax," the statutes provide for collection by arrest of the debtor and by distraint, and where it is some one else's tax for which a man is assessed, it is on the personal property of the true owner that the levy is made for the debt. It is the "true owner" who cannot hold a tax title, not a mere record owner. There is further a class of cases, of which this may be an instance, where one may be personally liable for a tax who is not the true owner. Such personal liability, however, constitutes an additional remedy for the city, in no way derogatory to its ordinary remedy against the land itself. If the city elects to proceed against the land, instead of against the petitioner, it seems to be as much an election to treat him as a stranger, as in the case of a mortgagee in possession. He is no longer a delinquent as to a personal debt, or in default as to this tax, which was never really "his tax." He in no way becomes a purchaser of his own property, and there is nothing in his purchasing a tax title on another man's property which would warrant changing that which all parties understood to be a sale, into a mere payment of a fictitious debt. *Home Savings Bank v. Boston*, 131 Mass. 277.

4. The petitioner contends that the respondent bank is not a mortgagee of record within clause 4 of Section 57 of the 1888 Act, and supports his contention by a clearly drawn distinction between the purpose of the provisions of Section 57 and of Section 61, and a very good argument that the Legislature intended to conclude a former mortgagee in the position of the respondent bank, who has once entered under his mortgage and become personally liable for the taxes, by the lapse of two years after the sale as provided by Section 61 (which is chronologically the earlier statute), rather than to give him the two years after actual notice of the sale originally provided for mere security holders who might otherwise remain, without any fault on their part, both in ignorance and helplessness as to tax sales. *Parker v. Baxter*, 2

Gray, 185. Commissioners Notes on Revision of Statutes, 1858, at end of Chap. 12. This point was neither raised nor argued in *Keith v. Wheeler*, as appears from an examination of the original papers in that case. What weight it would have had, or might now have, with the Supreme Court we cannot say, nor is it open to us, because the decision in that case, in which it appears from the papers that the matter of merger and foreclosure was fully argued, was a square decision that the former mortgagee was still a "mortgagee of record" within clause 4 of Section 57. That decision covers the case at bar, and so far as this court is concerned is conclusive of the argument. *Keith v. Wheeler*, 159 Mass. 161. *Stone v. Stone*, 163 Mass. 474.

5. What tender is necessary, or on what terms or by what proceedings the respondent may redeem, is not a matter which this court can consider. The matter of redemption is not a matter of law, nor even of general equity, nor in any way involved in these proceedings. *Barker v. Mackay*, 168 Mass. 76. *Dewey v. Donovan*, 126 Mass. 335.

I think that the petitioner has a good tax title, but that the respondent has a right to redeem, and having offered to redeem, the petitioner, pending proceedings therefor is not entitled to registration.

Petition dismissed.

W. O. Childs for petitioner.

G. F. Piper for respondent.

Note. — This case was taken to the Supreme Court on the question of redemption only. See *Lancy v. Abington Sav. Bank*, 177 Mass. 431.

AUGUSTUS P. LORING ET AL, TRUSTEES, PETITIONERS.

Middlesex, April, 1900.

Will — Compromise — Title Thereunder.

Title in this case is claimed by the petitioners as trustees under the will of Horace A. Lothrop, as modified by a compromise agreement in the Supreme Judicial Court under the provisions of Chapter 142 of the Public Statutes. The examiner reports that title under the will is not in the petitioners, but in the heirs of the decedent, and that the compromise is a mere agreement which has not yet been carried out. The examiner's point seems to be well taken.

Horace A. Lothrop died December 11, 1898, testate, leaving all of his estate to his widow for life, with full power of sale, remainder in equal shares to all his children. His will was disallowed by the Probate Court and, pending an appeal taken by the executrix, an agreement of compromise was executed by all parties in interest, and a petition to authorize the same filed in the Supreme Court under P. S. Chap. 142, Sec. 14-17. The agreement for compromise provided that the will should be admitted to probate subject to certain modifications; among them, that the executrix resign, two administrators with the will annexed be appointed, and that all the residue of the estate after the payment of debts and legacies be paid over to the present petitioners upon certain trusts set forth in full in the agreement. On March 8, 1899, a guardian ad litem appointed in accordance with P. S. Chap. 142, Sec. 15, having assented to the agreement, a final decree was entered that the will be allowed as modified by said

agreement; that the persons as therein agreed be appointed administrators c. t. a., and that they "after said compromise has been duly made, have power to carry out said compromise and to execute all instruments for the carrying out thereof."

The examiner suggests that it seems to be in accordance with local practice to assume that title passes under the will subject to the limitations of such a compromise, in cases where the compromise is incorporated according to its terms into the will itself. *Burbank v. Burbank*, 152 Mass. 254. All of the steps in the Burbank case, including the framing of the final decree, seem to have been taken on the theory that it was a probate proceeding. The agreement was as to how the will should be "construed"; the decree "affirmed" the decree of the Probate Court, authorized partition and division in the Probate Court in accordance with the terms of the agreement, and determined that the several estates disposed of by the will should "vest" and be held according to the tenures and the respective parties as agreed, "as devisees." The proceeding under Public Statutes Chapter 142, however, is not a probate proceeding. It is by its terms (Section 14) a bill in equity; it binds the parties to the proceeding and, through the appointment of a guardian ad litem, other contingent or future interests which may be affected, and authorizes the carrying out of the compromise agreement, but it does not affect creditors (Section 16). Much less does it set up a new will which the testator never made, under which title will pass to trustees and on trusts which the will neither named nor contemplated.

The power to dispose of property by will is strictly guarded by statute, and the courts will not give testamentary effect to an agreement or instrument that is not clearly incorporated into the terms of the will itself. P. S. Chap. 127, Sec. 7. *Thayer v. Wellington*, 9 Allen, 283. *Newton v. Seamen's Friend Society*, 130 Mass. 91. "Where a trust not declared in the will is established by a Court of Chancery against the

devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased." *Olliffe v. Wells*, 130 Mass. 221.

Whatever the general local practice may be, the proceedings in the case at bar seem to have been in accordance with the statutes. The agreement of compromise made by the parties has been ratified, and the court has authorized its being carried into effect. Until and unless that is done, however, title remains in the heirs subject to the life estate of the widow. The court having recognized the existence of a trust, clearly has the power to order or authorize such conveyance as may be necessary therefor, and to appoint agents to make the conveyance. *Felch v. Hooper*, 119 Mass. 52. In this case the administrators with the will annexed are the agents appointed by the decree of the Supreme Court to make conveyance to these petitioners, and such deed should be executed. After that is done there may be a decree for petitioners.

JOSEPH S. BODWELL ET AL, PETITIONERS.
WILLIAM W. BRADSTREET, PETITIONER.

Suffolk, June, 1900.

Flats — Boundary and Division Lines.

These two cases involve the apportionment of some seventy acres of flats at Point Shirley. The adjoining upland has been divided into building lots, the greater number of which, including nearly all of the shore lots, are owned in severalty by these two petitioners. Point Shirley is a peninsula having a narrow neck and a very irregular shore line which forms coves, headlands and beach, ocean front and harbor front; and the division of the building lots between the several petitioners is such that their respective shore frontages are far from symmetrical.

The two cases present some questions of division which seem not to have been specifically considered or settled in reported decisions, but it is obvious that the whole scheme of apportioning and dividing flats must be worked out on some consistent theory, and that as the value and use of the indented shore of Boston Harbor increases, it becomes of much importance that the division of flats and the establishment of lines in isolated individual cases should be so made that they will not clash with one another as the inevitable development proceeds.

The underlying principle is simply the adoption of such methods of division as will give to each parcel a line at low water proportional to its line at high water. *Walker v. B. & M. R. R.*, 3 Cushing 1. *Wonson v. Wonson*, 14 Allen, 71. *Tappan v. Boston Water Power Co.*, 157 Mass. 24. The early cases are collated in the long and learned note of the

reporter in *Commonwealth v. Roxbury*, 9 Gray, 451, at page 522, and Mr. Crocker discusses the subject somewhat in his *Notes on Common Forms*, 4th ed. p. 54.

The rules deducible from the Massachusetts cases, briefly stated, seem to be as follows:

1. Where an ordinary channel extends through the flats within one hundred rods of high water the side lines of the flats run in the most direct course from the shore to such channel. *Ashby v. Eastern R. R.*, 5 Met. 368. *Walker v. B. & M. R. R.*, 3 Cushing at 22, end. *Atty. Gen. v. Boston Wharf Co.*, 12 Gray, at 558. *Tappan v. Boston Water Power Co.*, 157 Mass. 24.

Where there is no channel:

2. Except in a cove or off a headland the side lines run at right angles to the general course of the coast regardless of the direction of the side lines of the upland. *Sparhawk v. Bullard*, 1 Met. 95 at 106. *Porter v. Sullivan*, 7 Gray at 441. *Wonson v. Wonson*, 14 Allen at 79. *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230. The dicta to the contrary by Chief Justice Parker in *Commonwealth v. Charlestown*, 1 Pick. 180 at 184, and of Wilde J. in *Dawes v. Prentice*, 16 Pick. 435 ad fin. are not mentioned by either Mr. Crocker or Judge Gray, and are clearly ignored or overlooked in the later cases.

3. The general course of the coast is determined by a general, or in engineering phrase, "average" straight line, to the exclusion of unimportant curves, projections or indentations. *Deerfield v. Arms*, 17 Pick. at 46. *Wonson v. Wonson*, 14 Allen at 86.

In the absence of lines fixed by deed or agreement:

4. Off a headland the flats are to be divided by diverging lines. Beyond this there are no decisions, but it is obvious that these diverging lines must be the radii of the average curve of the headland. On no other basis can an entire coast line be proportionately divided.

5. In a shallow cove the side lines run at right angles to a base line drawn from headland to headland. *Gray v. De-luce*, 5 Cush. 9. *Stone v. Boston Steel & Iron Co.*, 14 Allen, 230.

6. In a deep cove the low water line, or the line which must represent it, is divided in mathematical proportion to the line of ownership at high water, and the side lines run in the shortest course between such points of division. *Deer-field v. Arms*, 17 Pick. at 46. *Wonson v. Wonson*, 14 Allen at 86.

A. Where the line of low water lies wholly outside of a base line drawn from headland to headland, the base line should represent the low water line of ownership of the flats, and be so divided as to give to each owner of land on the shore the same proportion of the whole base line that he has of the whole shore line, the side lines running straight between such points of proportional division. *Rust v. Boston Mill Corporation*, 6 Pick. at 167. *Wonson v. Wonson*, 14 Allen at 85.

B. Where the mouth of the cove narrows and broadens again, a base line should be drawn across the narrowest part. Toward this base line proportionately divided as above provided the side lines should, of course, converge. Beyond the base line they should so diverge as to "give each owner his due proportion." *Walker v. B. & M. R. R.*, 3 Cushing at 25. *Wonson v. Wonson*, 14 Allen at 86. But beyond this general statement the cases do not give much assistance. The rule seems, however, to be simple. The same principle may be again extended. The flats beyond the base line may be treated as a new cove, of which the base line represents the shore line and of which the low water line is either the actual low water line or the line which must represent it. This last may be made a new base line drawn across the narrowest part, if the cove again narrows, and the process again repeated. If the cove does not narrow again and actual low

water is still more than one hundred rods from shore, the line which must represent the low water line may be ascertained by deflecting lines from the ends of the base line at right angles to the nearest average straight shore line, or the radii of the nearest headlands extended thereto.

C. Where another deep cove adjoins the one in question, however, the adjacent angle should be divided between them. *Wonson v. Wonson*, 14 Allen at 83.

D. Where the line of low water falls in part within the base line, the proportional division can be ascertained from a new base line drawn between points established by extending to low water mark either lines at right angles to the nearest average straight coast line, or radii from the nearest headland, as the case may be. This line may then be divided in proportion to the ownership of the upland, and the side lines of the flats then run straight toward such divisional points for a distance of one hundred rods, or until they reach low water.

In all cases by "low water" is meant extreme low water. *Sparhawk v. Bullard*, 1 Met. 95 at 108. *Sewall, etc., v. Boston Water Power Co.*, 147 Mass. 61.

7. All of these rules may be controlled, however, by lines established by the several owners by deed, agreement or such action as to create a presumption of such deed or agreement. *Adams v. Boston Wharf Co.*, 10 Gray, 521. *Atty. Gen. v. Boston Wharf Co.*, 12 Gray at 559.

8. The question of whether an owner of upland is entitled to flats in any direction other than toward deep water is happily not material to this case, because of the agreement between the parties by which the line between the flats of the petitioners and the respondent Lewis has been determined. It would seem that he is not so entitled, notwithstanding the apparently contrary opinion of Chief Justice Shaw. Note to *Commonwealth v. Roxbury*, 9 Gray at 522. *Walker v. B. & M. R. R.*, 3 Cushing at 24. *Henry v. New-*

buryport, 149 Mass. 582. While it may be that the colony ordinance said nothing expressly about navigation, and that the owner of any particular upland may care nothing about it, still, since any method adopted for division should be one in accordance with which the whole coast could be fairly divided without conflict of lines, since most flats are so situated that the right to navigate over them is a right of very real and present value, in fact a "property" rather than a right, and since in most cases it is their nearness to a channel or deep water that makes them valuable, the better rule would seem to be that the side lines should extend only toward deep water.

Decree to be framed accordingly.

LIPPMAN SELDNER, PETITIONER.

Middlesex, June, 1900.

*Mortgage—Foreclosure—Notice—Deed—Foreclosure of
Second Mortgage Where First Mortgage Has Been Paid.*

There were three mortgages on the property involved in this case; the first from one Boland to Seldner dated Sept. 6, 1898, the second from one Waldron, successor in title to Boland, to Seldner dated December 14, 1898, and a third mortgage which was assigned to Seldner, who on December 9, 1899, attempted to foreclose it by sale. Meantime the first mortgage had been paid, and on June 28, 1899, had been discharged of record. The notice of sale and foreclosure of the third mortgage recited that the premises would be sold subject to two mortgages, but the foreclosure deed was of the land as described in the third mortgage, and subject to nothing. On February 27, 1900, Seldner also made a foreclosure sale under the second mortgage. The notice for this sale described the premises as in the mortgage deed, "subject to a mortgage given by Thomas Boland to said Lippman Seldner for \$2,000" with date and book and page of record, and then went on with the recital that "said mortgage given by Thomas Boland to Lippman Seldner has been discharged and is no longer an incumbrance on the premises." The deed was of the estate described in the mortgage, and was made "subject to the same mortgage therein set forth."

The Examiner objects to both notices of sale, on the ground that they recite a prior incumbrance which as a matter of fact had been discharged, and further objects to the notice of foreclosure of the second mortgage on the ground that the

recital of a prior mortgage followed by a recital that it has been discharged, is confusing to laymen and open to the construction that some one might claim that the original mortgage, though purporting to be discharged, was really outstanding, thereby tending to discourage bids at the sale.

The point is one on which there seems to be great diversity of practice, and much difference of opinion among conveyancers. It is frequently asserted that a mortgagee, like any other property owner, can only sell what he has got. But a foreclosure sale is not per se a sale by the mortgagee at all. Neither is it, nor does it even purport to be, a sale by an owner of an estate as then existing. It is purely the execution of a power, a power to sell the estate described in the mortgage.

If the estate described in the mortgage and purporting to be conveyed thereby is an entire estate, a sale of an equity of redemption is void as a foreclosure, because it is not in accordance with the power. *Fowle v. Merrill*, 10 Allen 350. If, on the other hand, the mortgage is of an equity of redemption only, a sale of the entire estate is invalid because it likewise is not in execution of the power. *Donahue v. Chase*, 130 Mass., 137. *Dearnaley v. Chase*, 136 Mass., 288.

Whatever confusion has arisen in regard to the matter seems to have come partly from variance from the exact terms of a simple power, partly from a misunderstanding of certain decisions, and partly from a very proper desire that both notice and sale shall be in accordance with the actual facts and the real interests of the parties. There is also a marked distinction to be observed between cases in which the grant is made subject to a prior mortgage, and cases in which the prior mortgage is merely recited in the covenants. See *Ayer v. Brick Co.*, 159 Mass., 84.

While a foreclosure sale is not per se a sale by the mortgagee of his interest in the estate, it nevertheless is desirable that it should operate to pass that interest, and it usually

does so, by virtue of the addition in the foreclosure deed of express phraseology apt for that purpose, usually the phrase "and of every other power me hereto enabling." If such phraseology be omitted, there is nothing in a straight deed made in execution of the power of sale contained in an ordinary mortgage which will pass anything except what is strictly covered by the power. *Torrey v. Cook*, 116 Mass., 163. *Hermanns v. Fanning*, 151 Mass., 1, 5. So where there have been partial releases, the practice is either to describe the property as in the mortgage, with a recital as to partial release, or to describe the estate as it exists at the time of the notice and sale. But the standard form of mortgage expressly provides in the power itself for this latter contingency.

It is sometimes said that whether the entire premises be sold, or only the equity, is a mere matter of convenience of the parties; citing *Morton v. Hall*, 118 Mass., 511. *Cook v. Basley*, 123 Mass., 396. These two cases are pure cases of estoppel however, not intended to in any way encroach on the ordinary rule as to the execution of powers. *Donahue v. Chase*, 130 Mass., 137, 140. *Rogers v. Barnes*, 169 Mass., 179, 184.

Finally it is said that a mortgagee is under almost fiduciary relations to the owner of the equity, that he must observe the best of faith toward him, and secure a full and fair sale. Unquestionably he is bound to treat his mortgagor fairly, and one rule for such fair treatment is a strict observance of the power of sale. His only interest in the property is under the power and over the estate as set forth in the mortgage. With the state of the title thereafter he is not usually concerned. What the mortgagor does with the equity is not as a rule any of his business. *Model Lodging House Association v. Boston*, 114 Mass., 133, 138. *Silva v. Turner*, 166 Mass., 407, 412. In fact, the mortgagee cannot tell what the mortgagor's real interest is merely from the record. Perhaps his first mort-

gage note is merely accommodation paper, perhaps he has an arrangement with his first mortgagee to subordinate his mortgage to the second, or to have it otherwise taken care of. If he has given full covenants in a second mortgage, this is more than likely to be the case. By a sale of the equity only, instead of a sale of the entire premises, he might be deprived of the very money needed to satisfy the first lien. At all events, it is clear that the purchaser would pay less than the property is worth by the exact amount of the first mortgage. It may be proper and fair to purchasers to state at the foreclosure sale that there is a prior mortgage on record, but the sale itself must be of that, and that alone, which the mortgagee has been given a power to sell. So where the first mortgage has been paid or partially paid, it may be to the advantage of both equity holder and mortgagee that the facts be stated as they exist. But the mortgagee if he makes absolute statements, makes them at his peril, and unless he wants to create a title which must depend for its validity on estoppel arising from facts outside the record, he must see to it that both in his notice and his sale he conforms literally to his power.

In the case at bar the foreclosure of the third mortgage was clearly bad. Conversely I think the foreclosure of the second mortgage good, and the notice not only not misleading, but on the contrary, in accordance with the best practice.

Decree for petitioner.

MARY T. WHITNEY, PETITIONER.

Suffolk, July, 1900.

Mortgage — Conveyance of Equity to Mortgagee — Merger.

In 1884 one Burnham, the assignee of a mortgage outstanding on the land involved in this case, took a release of the equity of redemption by a deed which contained the recital that "this conveyance shall not operate to merge title acquired by assignment of mortgage." There is nothing to show any interest or estate intervening between the mortgage title and the equity of redemption. There is no further assignment of the mortgage on the records. Burnham died in 1892. The mortgage does not appear in the inventory of his estate. The petitioner claims title under his heirs.

The Examiner questions the continued existence of the mortgage title, and suggests that a discharge should be obtained. The suggestion is clearly justified by the language of some of the text books and by decisions in some of the States.

It is commonly said that whether merger takes place or not is purely a matter of intention. In some states it seems to be held that the intention is strictly a matter of fact, and that a purchaser can not rely upon the record even under a warranty deed; in others that the intention is a presumption of law regardless of the actual or expressed intentions of the parties. These cases are collected and cited in Jones on Mortgages, Sections 872 and 873. In some of the Massachusetts cases also, the intention of the parties is spoken of as the controlling element, but it is always an intention presumed from their interest, from the existence or non-exist-

ence of an intervening right, not merely from their expression of a purpose. It seems to be the invariable rule in Massachusetts, and it seems to be the true rule of law on principle, that whether merger takes place or not, depends, not upon the actual intention of the parties, expressed or unexpressed, but upon whether there is or is not an intervening interest or right to keep the two titles apart. *Hunt v. Hunt*, 14 Pick., 374, 383. *Evans v. Kimball*, 1 Allen, 240. *Grover v. Thacher*, 4 Gray, 526. *Savage v. Hall*, 12 Gray, 363. *Crosby v. Taylor*, 15 Gray, 64. *Strong v. Converse*, 8 Allen, 557. *Carlton v. Jackson*, 121 Mass., 592. *Dickason v. Williams*, 129 Mass., 182. *Keith v. Wheeler*, 159 Mass., 161.

In many cases the question is perhaps not one of technical merger, but rather of extinguishment, either of the mortgage title by payment of the debt in fulfilment of the condition of the deed, or of the conditional right itself. *Dexter v. Harris*, 2 Mason, 531. *Loud v. Lane*, 8 Met., 517. *Kneeland v. Moore*, 138 Mass., 198. (Note: — And see *Lydon v. Campbell*, 198 Mass. 29.) But whether the effect of the acquirement by one holder of the two interests be technically the drowning of a lesser in a greater estate by merger, or the mere extinguishment of a conditional estate or right leaving an unclouded fee under the major title, the result is the same, and so is the criterion as to whether the separate interests shall or shall not come together to produce this result.

Some confusion is caused by cases which really turn on equitable estoppel rather than on merger as a matter of legal title. Thus in the Michigan case of *Ann Arbor Bank v. Webb*, which was a bill to foreclose a mortgage, equity refused to recognize the mortgage title because of the fraud by which the assignment was obtained. *Young v. Hill* in New Jersey was a bill in equity for relief; and here the Court refused to recognize the merger, not because the merger was prevented by any intention of the parties, but because

the "legal advantage obtained by cancellation" (thus expressly recognized) "the defendant could not in conscience be permitted to retain." The Massachusetts case of *Aldrich v. Blake* was a bill in equity, and the court waived any decision on the question of merger, because whether there could be a merger or not, equity would not in that case allow it. *Ann Arbor Bank v. Webb*, 56 Mich., 377. *Young v. Hill*, 31 N. J. Eq., 429. *Aldrich v. Blake*, 134 Mass., 582.

In the case at bar there is no reason for the interposition of equity to stop or change the ordinary course of the legal title. The mortgage title and the equity of redemption came together in the same person. There being no intervening interest to keep them apart, they merged of necessity.

Decree for petitioner.

ANTOINETTE J. LOEHR, PETITIONER.

Middlesex, March, 1901.

*Restrictions — Agreement for Restrictions — Easements —
Streets on Plan — Abandonment.*

In this case an agreement was made October 1, 1875, between the owners of two adjoining tracts, providing for the establishment of a street between their respective estates, with courts branching therefrom, according to a plan recorded with the agreement. It was also agreed between the parties that a certain building restriction should be incorporated into any deeds that might be made by either of them. Subsequent conveyances by each party were made by reference to the recorded plan and using the lot numbers thereon, but in only two deeds was any restriction mentioned. These were both given by the party other than the one under whom the petitioner claims title, and before the agreement itself had been finally acknowledged and recorded. Moreover each deed contained a further restriction not contemplated by the agreement. Present locus, together with the locus of case No. 164, Stevens, Petitioner, constitutes one of the courts or culs de sac shown on the recorded plan. There are no lots on the court other than those belonging to these two petitioners.

So far as the restriction is concerned, it appears to have been not a restriction intended directly for the benefit of prospective owners of the various lots into which the two parcels were divided, but a mere agreement between the two parties themselves for the subsequent creation by each of restrictions on their respective tracts, which was not carried into

effect, but on the contrary was abandoned years ago by both parties. I am of opinion that the agreement has become obsolete and inoperative by reason of non-observance and acquiescence therein by the covenantee entitled to enforce it, and that no rights accrued thereunder, so far as the restriction is concerned, to anyone else. *Lowell Institution v. Lowell*, 153 Mass., 530. *Clapp v. Wilder*, 176 Mass., 332, 338.

As to possible rights in the court shown on the recorded plan, the question by whom, and to what extent, the right to have streets maintained as indicated upon a recorded plan can be enforced, is one which is continually arising in this Court. It is one as to which there are many decisions in the books; but they necessarily vary in accordance with the particular circumstances of each case. The underlying principle, although not stated in any one decision, seems, however, to be simple. The whole question is one of intent; but while the intent must be gathered from the circumstances of each case, this must be done in accordance with some definite rule of construction.

Whenever lands are purchased according to a plan on which streets are shown, the owner acquires by necessary implication a right to the use of every way or street thereon shown which may be available to the beneficial use of his premises. This doctrine has been carried very far. *Farnsworth v. Taylor*, 9 Gray, 162. *Rogers v. Parker*, 9 Gray, 445. *Fox v. Union Sugar Refinery*, 109 Mass., 292. *Langmaid v. Higgins*, 129 Mass., 353. *Boland v. St. Johns Schools*, 163 Mass., 229. No such right, however, attaches to a lot which is neither situated on the street or way in question, nor to which a right over such street or way is not necessary, or beneficial to its ordinary use. *Light v. Goddard*, 11 Allen, 5. *Boston Water Power Co. v. Boston*, 127 Mass., 374. *Pearson v. Allen*, 151 Mass., 79. The case of *Tobey v. Taunton*, 119 Mass., 404, is to be distinguished. In that case, while it was held immaterial that the old way was of no value to

the particular lot over which it was situated, the fact that there was other land to which it could be of beneficial use was not questioned. In the case at bar there were no lands other than those of the two petitioners to which any beneficial interest in this cul de sac could attach.

The recording of a plan carries with it no covenant or agreement, by implication or otherwise, that it may not at any time be abandoned or changed in any respect, if the rights of others are not affected thereby. *Boston Water Power Co. v. Boston*, supra. *Coolidge v. Dexter*, 129 Mass., 167. *Taft v. Emery*, 174 Mass., 332.

Decree for petitioner.

WILLARD WELSH *v.* JOHN B. McKENNA ET AL.

Middlesex, March, 1901.

*Tax Title — Commitment to Collector After Reassessment
— Tax Sale — Error in Collector's Charges.*

The respondents in this case have filed twenty requests for rulings. All but the 12th, 16th and 17th are fully covered by the opinion filed with the decision in *Robinson v. Church*, Land Court Decisions, p. 13, *ante*.

The 16th and 17th requests are based upon the following uncontroverted facts: Three of the lots covered by this petition (88, 90 and 92) were assessed for the taxes of 1893 by mistake to Spaulding and Wells, owners of neighboring land, but having no interest in these lots. The warrant by which the taxes for 1893 were committed to the collector contained the names of Spaulding and Wells as the owners of these lots. When the collector prepared to hold his sale for the unpaid taxes of 1893 he notified Messrs. Spaulding and Wells, who informed the assessors of their error. The taxes were thereupon (Aug. 5, 1895) reassessed to the true owner, one Lewis. The collector upon being informed by the assessors of this reassessment, and at their request, struck out from the original warrant as committed to him, the names of Spaulding and Wells as the owners of the lots in question, by drawing his pen through their names, and inserted in their place the name of Lewis. Demand of payment was then made on Lewis, and thereafter the collector proceeded to sell as for unpaid taxes of 1893 assessed to said Lewis as owner.

Under the early decisions an illegality in the assessment invalidated a sale. *Goodrich v. Lunenburg*, 9 Gray, 38.

This, however, was changed by the Acts of 1859, Chapter 118. *Cone v. Forest*, 126 Mass. 97.

Under the provisions of the General Statutes taxes improperly assessed to the wrong owner might be reassessed to the person to whom such tax ought at first to have been assessed. G. S. Chap. 11, Sec. 53. The reassessment having been made, a recommitment to the collector became necessary. *Jennings v. Collins*, 99 Mass. 29. Under the provisions of the General Statutes such recommitment did not necessarily call for a new warrant however. The list as originally committed to the collector was liable to change by reason both of subtractions from and additions to the warrant. Taxes assessed under G. S. Chap. 11, Sec. 50, to persons omitted from the original assessment, were to be added to and entered in the tax lists of the collector, and paid over as specified in his warrant, and this provision was held to apply also to cases of reassessment. *Hubbard v. Garfield*, 102 Mass. 72.

This case would be conclusive as to the case at bar had not the statute again been changed. As the Act of 1859 was passed to meet the overstringency of the rule declared in *Goodrich v. Lunenburg*, Chapter 394 of the Acts of 1870 seems to have been passed in immediate consequence of *Hubbard v. Garfield*. By that Act it was provided that taxes reassessed shall be committed to the collector for the time being in the same manner as other taxes, except that the name of the person to whom the taxes were originally assessed shall be stated in the warrant. This provision is still in force. Acts of 1870, Chap. 394. P. S. Chap. 11, Sec. 80. I think this calls for a new commitment and a new warrant. A mere change made in the old warrant by the collector even at the request of the assessors, by striking out the former names and substituting therefor the name of the person to whom the land was assessed, not as a reassessment, but as of the date of the original warrant, is not a compliance with the requirements of the present statute.

A further objection to the validity of the sale is raised by the respondents' 12th request, because of the amount of the collector's charges. It appeared in evidence that the collector charged one dollar for his affidavits recorded in the registry of deeds, and thirty cents each for recording, while the actual price paid for recording them was only fifteen cents for each. The statute authorizes the recording in the registry of deeds of an affidavit as to demand of payment, and of an affidavit as to the posting and publishing of notice of sale by "a disinterested person, or any deputy collector, or of the collector who makes the sale." Acts of 1888, Chap. 390, Sec. 39.

The charges and fees which shall be allowed a collector are specifically enumerated and they "and no other" shall by statute "be severally added to the amount of the tax." Among them are "For obtaining affidavit of disinterested person, one dollar. For recording affidavit, the register's fees." Acts of 1890, Chap. 331, Sec. 2. These charges being "added to the amount of the tax" become a part of the tax itself so far as the sale is concerned. Not only is an owner entitled to know the exact amount of the tax for which his land is held, so that he may avail himself of his statutory right to discharge it before sale, but the collector has no authority to make any sale whatever except for the payment of the tax committed to him. *Alexander v. Pitts*, 7 Cush. 503. *Knowlton v. Moore*, 136 Mass. 32. (Note: — See also *Lancy v. Snow*, 180 Mass. 411.)

Petition dismissed.

Joseph Bennett for petitioner.

W. C. Rogers, G. W. Bartlett for respondents.

ALEX. Z. COWAN ET AL., PETITIONERS.

Middlesex, April, 1901.

Restrictions — Disregard and Violation — Change in Character of Neighborhood.

Title in this case comes under a deed given in 1853 in which the land was described as lot 29 on a plan of house lots in Cambridge, and was conveyed subject to certain building restrictions. The Examiner reports that these restrictions were originally placed on large amounts of the land in the vicinity, but that they are now quite generally disregarded, and that no mention of the restrictions is made in many of the later deeds. The petitioner asks for registration of title free from the restrictions. This is a typical case of a class of petitions which is rapidly increasing in number. The question has been raised at the outset whether this Court can declare as a matter of law that any restriction of record has terminated because of a general violation of it, or because of a change in the character of the neighborhood.

Merely because a Court of Equity will not under the circumstances of a particular case enforce compliance with the terms of a restriction, it by no means follows that the restriction itself is terminated. *Parker v. Nightingale*, 6 Allen, 341, 349. *Ware v. Smith*, 156 Mass. 186. *Jackson v. Stevenson*, 156 Mass. 496.

In *Jackson v. Stevenson*, while the Court held that the character of the neighborhood had so far changed that it would be inequitable, and not effective in carrying out the purpose for which the restrictions were imposed, to any longer enforce compliance with them, it nevertheless recog-

nized the restrictions as still existing, and that the plaintiffs were entitled to substantial damages for their breach.

It is only where the character of the neighborhood has changed so completely that the purpose for which the restrictions were imposed has wholly failed, that it can be said that the restrictions have terminated. *Bangs v. Potter*, 135 Mass. 245. In *Bangs v. Potter* a large tract of land near a railroad terminal had been cut up into lots for warehouse purposes, and through these lots a space had been reserved for railway tracks. The space was restricted to use as a railway, and it was provided in the deeds that no building should ever be built over it. The railway tracks were discontinued. The Court held that the servitude was expressly limited to a railway, "and though it would be a benefit to each lot to receive light and air through the space which was to be kept open for the railway, the benefits of light and air are incidents which result from the provisions of a railway, and are not provided for independently of the railway, and no servitude is imposed or easement granted for any purpose but the railway; and when the railway was abandoned, all servitudes and easements terminated, and each owner had the right to use the whole of his lot for any purpose he pleased, without restraint by the 'terms of sale or provisions in the deeds.'"

The only cases in this Court in which titles have thus far been registered free from restrictions of record have been cases in which the entire purpose for which the restrictions were imposed has come to an absolute end; in which not only would a Court of Equity refuse to enforce the restrictions and no damages would lie for breach of observance, but in which it could further be held that the restrictions in themselves had terminated with the termination of the physical conditions on which alone the restrictions were based. Examples of such cases are the dwelling house restrictions on Bosworth and other streets now devoted absolutely and exclusively to business purposes, and certain restrictions on

Cambridge property based wholly on the existence and use of an old canal, long since filled in. Where the character of the property and the neighborhood has merely undergone a partial, even though substantial change, or where it could not be said that no damages whatever could be recovered by anybody because of a breach, registration free from restrictions of record must be refused.

As to a general disregard of restrictions in the neighborhood, while such disregard might estop those who had themselves thus violated them, it would not affect those who had not. General disregard and violation of restrictions in a neighborhood, without express acquiescence by all parties interested in the particular case under consideration, will not waive or terminate the restrictions. And "an owner may neglect to object to infractions of restrictions to some extent, without losing his right to enforce the restrictions when they more clearly and seriously affect him." *Jackson v. Stevenson*, 156 Mass. 496. *Linzee v. Mixer*, 101 Mass. 512 ad fin. *Dorr v. Harrahan*, 101 Mass. 531. *Payson v. Burnham*, 141 Mass. 547. (Note: And see *Bacon v. Sandberg*, 179 Mass. 396; *Scollard v. Normile*, 181 Mass. 412.)

Decree accordingly.

THE FINNISH EV. LUTHERAN CHURCH, PETITIONER.

Worcester, April, 1901.

Deed — Indefinite Grantee — Unincorporated Association.

In this case the following facts appeared. Title comes under a deed dated June 10, 1898, from one Lowe to three grantees, namely: (1) "The Finnish Evangelical Lutheran Church, Independent," (2) "The Finnish Temperance Society, called 'Aamun Koitto,' a branch of the Eastern Finnish Temperance Union of the United States of America," (3) The Finnish Labor Society, called "Saima"; all three being described as corporations established under the laws of the Commonwealth of Massachusetts, and located in Fitchburg.

(1) At the date of the deed there was in existence a corporation having the name, "The Finnish Evangelical Lutheran Society of Fitchburg, Mass."

(2) The Finnish Temperance Society, etc., was a branch of a Michigan corporation. Its members were constantly changing. There were 134 members at the date of the deed (June, 1898), of whom 76 are still in Fitchburg, and the rest have scattered, many of them to parts unknown.

(3) The Labor Society at the date of the deed was a mere association of individuals, there being 98 members. About January, 1900, fifty of these 98 members having withdrawn from the association and 52 new members having been admitted, the then association was incorporated in Massachusetts under the name of "The Finnish Labor Society, Saima, of Fitchburg, Mass." The present address of only 61 of the original 98 members can now be ascertained.

The property was purchased with funds contributed by the members of all three organizations, and the deed is in possession of the Lutheran Society, to whom it was delivered as a grantee described in the deed as the "Lutheran Church."

On the foregoing facts I am of opinion that the deed was a valid deed to the Lutheran Society, but that the Temperance Society and the Labor Society were not corporations capable of taking title to real estate, and further of opinion that it was not the intention of the parties that the members of these two associations should take individually as tenants in common.

Undoubtedly where there is an association perfectly well known and definitely described, a grant will not be defeated merely because it is ultra vires, or because there is some formality yet remaining to be completed before the grantee has authority to act as a corporation. *Dyer v. Rich*, 1 Metcalf, 180. *Smith v. Sheeley*, 12 Wallace, 358. *Byam v. Bickford*, 140 Mass., 31. *Byam v. Bickford* goes a good way, and the facts bear some general resemblance to this case; but in *Byam v. Bickford* the unincorporated society was a body well known, all the members of which could be ascertained, and it existed solely for the purpose of holding the real estate in question. It was held that the members took as tenants in common.

I think the case at bar however, so far as the two unincorporated associations are concerned, comes within the principle of grants which fail because of the indefiniteness of the grantee. *Hall v. Leonard*, 1 Pick, 27. *Thomas v. Marshfield*, 10 Pick, 364. *Douthitt v. Stinson*, 63 Mo. 268. The language of the Court in the case of *Hamblett v. Bennett* is peculiarly applicable to the case at bar. "The Circle was not a corporate body capable in its collective capacity of taking any estate in land. And though a grant to the Circle might, under some circumstances, be construed as a grant to the individual members of which it was composed, yet

there seems to us nothing in the evidence which would authorize a jury to infer that such a grant was made. The Circle was a changeable and fluctuating body. The purpose to create a tenancy in common would be extraordinary and improbable." *Hamblett v. Bennett*, 6 Allen, 140, 145.

There seems to be, nevertheless, a clear equitable interest in favor of both the Temperance and the Labor Societies. *Bailey v. Kilburn*, 10 Met., 176. The Church Society is willing to make a conveyance to trustees to hold for the benefit of itself and also of the Temperance and the Labor Societies. If this is done the title may be registered in such trustees.

So ordered.

PATRICK T. MAGUIRE *v.* NATHANIEL M. SAF-
FORD.

Norfolk, June, 1901.

*Way — By Necessity — In Favor of Reversion, Notwith-
standing Grant to Estate in Dower.*

In this case the petitioner's land is divided into two tracts, separated by the estate of the respondent. All three tracts came originally from an estate belonging to one James Adams. In the settlement of the Adams estate the two tracts now belonging to the petitioner were set off to the widow as dower. The tract now of the respondent was sold by the administrator of the Adams estate for the payment of debts. A well defined way originally existed from the inner tract now belonging to the petitioner through the respondent's land to the homestead and thence to the street. In the set-off of the widow's dower there was given by the commissioners "privileges of passing and re-passing through said other lands and tanyard (now estate of the respondent), to and from said two acre lot to cultivate and improve same." The land now of the respondent was for many years leased to the owner of the reversion.

The petitioner claims a right over said way either by grant, prescription or necessity. The respondent denies him any right of way whatever.

As to the right claimed by grant, the easement assigned to the widow in her set-off of dower ceased with her dower estate. *Hoffman v. Savage*, 15 Mass. 130.

No right of way can have been acquired by prescription, because the use began in grant, and was mainly continued under a lease-hold right until within the statutory period.

As to a way by necessity, it is argued that the necessity must exist at the time of the original separation of the tracts, and that if there was then a way out for the alleged dominant estate, no grant will be presumed from necessity. But the time of the real separation of these estates was the time of the administrator's sale. The set-off in dower was not a separation of the land or of the fee in the land, but merely of the use of the land for a limited period. Notwithstanding the assignment of a right of way to the dowager in her set-off of dower, or rather regardless of such assignment, a right of way by necessity arose upon the administrator's sale for the payment of debts of that portion of the estate which had not been set off in dower, over the tract so sold, in favor of the two acre dower tract now belonging to the petitioner. *Symmes v. Drew*, 21 Pick. 278. *Viall v. Carpenter*, 14 Gray 126. This is not the case of an administrator attempting to impose an easement upon land of the intestate other than that which he was then selling as in *Baker v. Willard*, 171 Mass. 220, 226.

The respondent further contends that if a right of way by necessity existed, it determined upon the acquirement by the owner of the dominant estate of an undivided interest in another estate adjoining his inner tract and lying between that and a more convenient public street. It does not seem to me that even if the petitioner by this last purchase has acquired a right of way as against his co-owners over the tract in which he holds an undivided interest, (which is, to say the least, doubtful) that he can increase that burden by a user in favor of the inner lot, which he owns individually. *Zell v. Universalist Society*, 119 Pa. St. 390. *Greene v. Canny*, 137 Mass. 64.

(Note, and see *Hazen v. Mathews*, 184 Mass. 388, 393.)

Decree for petitioner of right of way by necessity.

R. W. Light for Petitioner.

Z. S. Arnold for Respondent.

WINIFRED R. MORRIS, PETITIONER.

Middlesex, October, 1901.

*Mortgage — Discharge to Mortgagor After He Has Parted
With the Equity of Redemption — Equitable Assign-
ment.*

In this case the Examiner questions the effect of a discharge of mortgage made to a mortgagor after he had parted with his equity of redemption. The discharge is in ordinary form, acknowledging payment by the mortgagor, discharging the mortgage, and releasing and quit-claiming to the mortgagor and his heirs and assigns the premises. The Examiner expresses no personal opinion, but orally states the conflicting opinions and practice of conveyancers in the matter, and calls attention to some confusing decisions and dicta in the books, and to the fact that there seems to be no decision in this State squarely on the point. The practical question is whether a conveyancer may in such case rely upon the record, or must go outside and ascertain the circumstances under which the payment was made, and the "discharge" taken.

It is frequently said that an assignment will operate as a discharge, or a discharge as an assignment, according to the real interests, relations or intent of the parties, and regardless of the particular form or phraseology of the instrument. In a general way this is true, but in such cases the words "assignment" and "discharge" are not used in the technical sense in which they are used by conveyancers, and to a conveyancer the result is, therefore, confusing. A more accurate statement would be that an assignment often has

the same effect or result as a discharge, and that equity will sometimes cause the payment of the mortgage to effectuate, instead of a discharge, an assignment. A technical "assignment" and "discharge" are far from being interchangeable terms, and the principle of the common law by which an assignment is often given the practical effect of a discharge is a very different one from the rule of equity by which a payment and release may — under some circumstances — be given the effect of an assignment. The first is simply a case of merger. When the mortgage title and the equity of redemption come together in the same person without some intervening interest or estate to keep them apart they must merge. But if there be such intervening interest or estate then they cannot merge. *Eaton v. Simonds*, 14 Pick, 98. *Loud v. Lane*, 8 Met. 517. *Crosby v. Taylor*, 15 Gray, 64. *Strong v. Converse*, 8 Allen, 557. *Smith v. Hitchcock*, 130 Mass. 570. *Keith v. Simonds*, 159 Mass. 161. *Whitney*, Petitioner, Land Court Decisions, p. 43, *ante*.

Here again equity may — as always — interfere, and, as between the parties, assert an equitable intervening interest which will keep the estates apart, or destroy an inequitable interest and extinguish the debt. *McCabe v. Swap*, 14 Allen, 188. *Ryer v. Gass*, 130 Mass. 227. For the conveyancer, however, the question as to the legal title is simply, "is there anything to keep these estates asunder?" He may be put upon inquiry outside the record, but if not, and the two estates come together in the same person, then he can rest assured that what the law has joined together, will stay so.

Under the rule of equity, the decision whether payment of the mortgage to the mortgagee will operate practically as a discharge or an assignment seems to depend upon one simple question, viz.: "As between all the parties in interest, whose duty was it to pay the mortgage?" *Strong v. Converse*, 8 Allen, 557. *Ryer v. Gass*, 130 Mass. 227. *Pratt v. Buckley*, 175 Mass. 115. And cases next below.

If a man has assumed the burden of the mortgage debt, by covenant of warranty or otherwise, payment by him extinguishes the mortgage, even though he take a formal assignment. *Wade v. Howard*, 6 Pick. 492. *Brown v. Lapham*, 3 Cush. 551. *Kilborn v. Robbins*, 8 Allen, 466, 471. *McCabe v. Swap*, 14 Allen, 188. *Wadsworth v. Williams*, 100 Mass. 126. *Swett v. Sherman*, 109 Mass. 231. (Note:— And see *Lydon v. Campbell*, 198 Mass. 29.)

On the other hand, if the duty of payment be with the holder of the equity of redemption, payment by the mortgagor, even though it extinguishes the debt between him and his mortgagee, will still be held to operate as an assignment of the mortgage title. *Hermanns v. Fanning*, 151 Mass. 1. *Pratt v. Buckley*, 175 Mass. 115.

Where no duty appears and the payment is voluntary, as to an innocent purchaser a discharge is a discharge and the debt is extinguished, whatever the intent or interests of the parties. *Eaton v. Simonds*, 14 Pick. 98. *Wedge v. Moore*, 6 Cush. 8. *Mansfield v. Dyer*, 133 Mass. 374.

True as between the parties, there being no innocent purchaser's rights involved, equity will still interfere as in any other matter, and cancel a discharge or rectify an error where justice demands. *Bruce v. Bonney*, 12 Gray, 107. *Davis v. Winn*, 2 Allen, 111. *Willcox v. Foster*, 132 Mass. 320. *Short v. Currier*, 153 Mass. 182.

Where the instrument is neither an assignment nor a discharge, but a deed of quit-claim or release, it will be construed (like any other deed) in accordance with the intent of the parties. But this is very different from turning an assignment into a discharge or a discharge into an assignment interchangeably. *Barker v. Parker*, 4 Pick. 505. *Wade v. Howard*, 6 Pick. 492. *Crosby v. Taylor*, 15 Gray, 64. *Wadsworth v. Williams*, 100 Mass. 126. *Tucker v. Crowley*, 127 Mass. 400. *Jager v. Vollinger*, 174 Mass. 521.

I think, therefore, that payment by, and discharge in ordi-

nary form to, a mortgagor who has parted with his equity of redemption, operates as to an innocent purchaser, and in the absence of anything of record to prevent, purely as a discharge, and that no release from such mortgagor is necessary.

Decree for petitioner.

JAMES H. STARK ET AL., PETITIONERS.

Suffolk, October, 1901.

Possessory Title — Assessors' Plan.

This is a curiosity in titles. The land is a part of the Gerrish farm, which was originally laid out into lots according to a plan which, as found in earlier cases in this court, not only was not based on an accurate survey of the ground, but was inconsistent in itself, the distances and angles indicated being impossible. The property spread out somewhat in fan shape up over the hill, and while at the foot of the hill, near the sticks of the fan, there was a deficiency of land, on the top of the hill there was a surplusage.

When a correct survey was finally made, and incidentally the curved portion of Bigelow Street was moved materially to the North, it left more land on the curve than the Assessors had previously assessed for taxes. The deeds of the lots on the curve of Bigelow Street were so drawn that each grantee bounded on the land of his neighbor, but the Assessors disposed of the surplus by the simple and ingenious method of giving to each land owner what he had previously been assessed for, and inserting a new wedge shaped parcel between the lots as laid out on the old plan, and assessing the tract thus created to "owners unknown." The purchaser at the tax sale of this no-man's land, thus created, which is our present locus, promptly entered upon his domain; procured an agreement with his neighbors by which a survey was made; and there was set off to each neighbor the land to which he considered himself entitled under his original deed, the tax title purchaser retaining the balance. This posses-

sion has been maintained by the purchaser at the tax sale, and his successors, the petitioners, for over twenty years. All holders of the original record title have been cited and received actual notice of these proceedings. The owner on the West assents to a decree according to the line of the fence (which was erected at the time of the agreement after the tax sale), while the other adjoining owners assent to the petitioner's claim.

Decree for petitioner.

WALLACE M. SWIFT *v.* MARY A. EMERSON.

Suffolk, October, 1901.

Trust — Declaration Subsequent to Creation of Trust — Admissibility in Evidence — Statute of Frauds — Merger of Legal and Equitable Estates.

Title in this case comes under a deed from one Newhall to Fred M. Libbey and Ethel N. Morris, "Trustees," dated and recorded in March, 1894. November 1, 1897, there was recorded a declaration of trust, dated and acknowledged in October, 1894, and signed by Newhall, Libbey and Morris, reciting the foregoing deed and declaring that "the trusts on which this land was held by said deed were these: That the said lands were to be holden for the sole use and benefit for said Ethel N. Morris, her heirs and assigns, free from the control of her husband; said (prior) conveyance from Ethel N. Morris to said Libbey, and said Libbey to Newhall, were without any consideration and for the sole purpose of excluding the husband of said Ethel N. Morris from having any interest therein." Contemporaneously with the recording of this declaration of trust there was recorded a deed from Morris and Libbey, "Trustees," to the respondent, — Mary A. Emerson. In this deed the granting clause reads, "we, Ethel N. Morris and Fred M. Libbey, in consideration of one dollar, etc., paid by Mary A. Emerson, give, grant, bargain, sell and convey unto the said Mary A. Emerson a certain parcel of land," described. At the end of the description is the recital, "this conveyance is made by us as trustees under declaration of trust, dated October 13, 1894, and

recorded herewith." After the habendum there follow full covenants, including one of warranty, on behalf of "ourselves and our heirs, executors and administrators." Just before the testimonium clause is a release of dower, curtesy and homestead by the wife of Fred M. Libbey and the husband of Ethel N. Morris, and the deed is signed and sealed by all four.

Emerson gave a contemporaneous mortgage on the property to Ethel N. Morris, individually, which was subsequently foreclosed, and the petitioner became the purchaser at the foreclosure sale. Ethel N. Morris' estate is in bankruptcy.

At the hearing in this court there was produced a further or supplementary declaration of trust, recently executed by Newhall, Libbey and Morris, in which a power of sale to the trustees is recited.

The respondents claim, first, that the deed from the trustees was void owing to the absence of a power of sale in the original declaration of trust; or, second, that it conveyed the legal title only and not the equitable title; and, third, that the subsequent declarations of trust cannot avail the petitioner.

The first question is as to the admissibility in evidence of the recent supplementary declaration of trust. In the view I take of the other questions involved, this is immaterial. Nevertheless, the respondents are entitled to a ruling and I rule that the declaration is admissible. It seems to me that the respondent's contention is founded upon a misapprehension. It is true that the declarations of a grantor "to create a trust" must be prior to or contemporaneous with the conveyance, but this is not a matter of creating a trust. It is merely a matter of showing what the trust was. That is a question of fact. *Urann v. Coates*, 109 Mass. 581. *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159. It is not a formal instrument creating the trust, but a memorandum

put in writing to satisfy Public Statutes, Chapter 141, Section 1, and furnish evidence of a trust already existing. *Dorr v. Clapp*, 160 Mass. 538. *Kendrick v. Ray*, 173 Mass. 305. It is neither the case of a declaration subsequently made to affect the rights of an intermediate purchaser for value, nor a declaration in a party's own interest. It is rather in favor of a purchaser for value as against the declarant. *Stratton v. Edwards*, 174 Mass. 374. *Emery v. Boston Terminal Co.* 178 Mass. 172 at 184.

The next question is as to the power of the trustee to make the sale. It is frequently asserted in a general way that a trustee "cannot" sell his trust estate without due authority therefor; but this must refer, of course, to such a sale as will convey complete title, free from trust. That a trustee not only can always sell and convey his legal title, but that the legal title must pass by every apt conveyance or devise, is too well settled to require discussion. That such a conveyance will, however, still be subject to all the trusts is, of course, equally plain. The next question is as to whether the deed from Libbey and Morris conveyed the equitable as well as the legal title. Whenever the full legal and equitable titles come together in one person, with no interest to keep them apart, there is a merger by operation of law, and the trust is ex necessitate, at an end. In this case we have a full warranty deed executed by the holder of the equitable as well as the legal title. The covenant of warranty is a personal covenant on her part. It does not purport to be a covenant in her representative capacity, nor does the grant purport to be a grant of the legal estate only. True, the covenants refer only to the granted premises, but that "the premises" cannot be restricted in such a case to the limited interest of the grantor in a representative capacity was fully considered and settled in *Sumner v. Williams*, 8 Mass. 162, a case which has been fully cited and explained in many subsequent decisions. It seems to me that under the deed from

Morris and Libbey to Emerson the grantee acquired a complete title. Harlow *v.* Cowdrey, 109 Mass. 183 at 184.

Decree for petitioner.

L. R. Wentworth for Petitioner.

Z. S. Arnold for Respondent.

WALTER C. HOOK, PETITIONER.

Middlesex, December, 1901.

Condition or Restriction.

The question in this case is whether the provisions in the deed from Richard B. Callender to Stephen G. Allen of May 27, 1855, constitute a common law condition. These provisions are as follows: "This conveyance is upon the express condition that no building shall be erected on said premises within eighty feet of Chestnut Street abutting north of said premises; said Chestnut Street to be forever kept open not less than thirty-six feet in width. The part of the above described premises abutting on said Chestnut Street being immediately opposite other land of grantor and said premises are conveyed subject to the express condition that said grantor and those holding under him may be forever exempted from obstruction of prospect, light or air, by having any building erected within eighty feet as aforesaid of said Chestnut Street."

The language of the first of these provisions is very close to the phraseology used in the recent case of *Clapp v. Wilder*. *Clapp v. Wilder*, 176 Mass. 332. It does not seem to be the policy of the court, however, to extend the force of the decision in that case beyond the immediate facts there involved. Many cases exceedingly close to *Clapp v. Wilder* have been decided the other way. The whole subject is thoroughly discussed, and all recent decisions are cited in the opinions in that case. Without regard to the reasoning of the minority of the Court as expressed in the dissenting opinion, it seems clear from the decision itself that it was felt

necessary to draw the line in that case between a condition and a restriction, lest the principle of the existence of common law conditions, and the right to create and enforce them should appear to be lost to our law.

In this case, however, the condition (if such) affects a large tract of land, of which the present premises formed but a part; the burden of the condition applies wholly to land other than the present premises; the owner of locus could neither violate the condition himself nor prevent its violation by another; and a Court will be very slow either to aid the forfeiture of an estate for the violation of an agreement for which the owner is not responsible, and against which he is not able to defend himself, or to render a tract of land unmarketable by reason of inability to divide it up into the usual building lots for which such property must properly be used.

The present case, however, does not seem to me to come within what I understand to be the real principle of *Clapp v. Wilder* at all. The main test as to whether a given provision is or is not a condition, is whether the parties had in mind an appurtenant right or a personal right. Whether there is a general scheme of improvement, and whether other people can or cannot avail themselves of the terms of the provision, whatever it be, is a mere corollary or incident to the proposition. It does not affect or determine the nature of the main proposition itself. The right of others to avail themselves in equity of such provisions is based wholly upon the ground that the law will not permit a man to disregard an agreement under which he acquired land, to the detriment of anyone else who, in good faith, relied upon such agreement, and had a right to so rely, be such provisions in form of a condition, restriction, personal agreement, or that anomaly of the Massachusetts law, a personal agreement, "in the nature of" an easement running with the land. (Note: See *Wilson v. Mass. Inst. of Technology*, 188 Mass. 565 at 581.)

Whether the particular provision be a "condition" or not must be determined by the intention of the parties, and that intention must be found if possible, from the terms of the instrument itself. If it was intended for the benefit of the grantor and his heirs personally, and the language is sufficient therefor, it will be a condition, whether, incidentally, other owners of the grantor's lands can take advantage of it or not; and if it was intended solely for the benefit of real estate, as such, then it is not a condition.

In this case, all of locus being situated more than eighty feet distant from Chestnut Street, it is only necessary to determine that the provisions do not constitute a condition, for breach of which upon any part of the original tract, there might be a forfeiture of the whole.

As a restriction, the provision does not apply to this particular locus.

Decree for petitioner.

MARY BORNSTEIN, PETITIONER.

Suffolk, January, 1902.

*Mortgage to Trustee on Undisclosed Trust — Discharge —
Assignment — Foreclosure.*

The question in this case is one that is frequently raised by Examiners. While there are few decisions that bear on the matter, the principles involved seem to be fairly clear.

There are two mortgages in this title given to a mortgagee as "trustee" without anything further of record to disclose the nature of the trust. Each was assigned by the "trustee" mortgagee. One was then discharged, and the other foreclosed. The question is whether there is not here notice of a trust attaching to the property so that a purchaser is put upon his enquiry as to the authority of the alleged "trustee" at the time he assigned the mortgages, and as to his proper application of the proceeds of the assignment.

So far as the legal title is concerned, the assignments were formal assignments from the person appearing of record to be the owner of the mortgage. There was nothing to indicate any restriction on his power to assign. The assignees took the legal title. *Manahan v. Varnum*, 11 Gray 405. *Stark v. Boynton*, 167 Mass. 443. *Commonwealth v. Globe Investment Co.*, 168 Mass. 80.

As to the equitable title, unquestionably, an assignee of a mortgage from a declared trustee who holds under an undisclosed trust, takes subject to the terms of the trust, whatever they may be. *Shaw v. Spencer*, 100 Mass. 382. *Smith v. Burgess*, 133 Mass. 511, and kindred cases. The liability

attaches to the trust, however, rather than to the particular property in which the trust is vested. Whoever takes the corpus of the trust, with reason to know that it is a trust property, takes it, nevertheless, subject to all its natural incidents, one of which, in case of a mortgage, is the right of the mortgagor to pay his debt at maturity, and another is the ability on the part of the holder of a mortgage to enforce the security on default of the debt by foreclosure under power of sale. The trust fund still remains subject to the terms of the trust in the hands of its holder, and if the assignee has bid in at the sale, and himself acquires the land, the land becomes the corpus of the trust and remains subject to its terms, not because it was the security given for the original mortgage debt, but because the holder of the trust estate has changed his mortgage debt into land. Where, however, the mortgage has been either paid off or foreclosed by sale to a purchaser for value (both of which events happened in the case at bar), these are mere incidents of the nature of the trust property. The trust, whatever it may have been, still attached to the money in the hands of the assignee, into which form the corpus of the trust property had of right and of necessity been converted, but there is no trust to attach to mortgaged real estate, either in the hands of a mortgagor who has simply paid his debt, or of a purchaser at foreclosure sale. *Sturtevant v. Jaques*, 14 Allen, 523. *Jones v. Atch.*, Top. & S. Fe R. R., 150 Mass. 304.

Decree for petitioner.

HENRY KAULBECK *v.* WILLIAM G. THOMPSON,
ADMR.

Middlesex, February, 1902.

*Debts — Administrator's Lien — Actual Existence of Debts
— Newly Discovered Assets — Laches.*

Locus in this case formed a part of the estate of Philip Whittemore, who died in 1848, intestate, and it was, among other parcels, set off to his widow as dower in 1850. After the death of the widow in 1872 a sale was made of locus, and deeds were obtained which purported to convey, (although in some cases ineffectually) the interest of all the Whittemore heirs. In the meantime one of the heirs, Henry W. Whittemore, had died in 1869, intestate, and in the same year his estate was represented insolvent, and Commissioners in insolvency were appointed. Henry W. Whittemore's interest in this particular tract of land was not inventoried, and was apparently not actually known to his administrator. In 1891 administration de bonis non of his estate was granted to the respondent, who proceeded to sell the interest which his intestate had had as reversioner in sundry parcels other than locus which had been set off to his father's widow in dower; but present locus did not appear in any of the proceedings. The petitioner claims title under an invalid deed from a putative guardian of the Henry W. Whittemore heirs, and has since acquired a good release from the heirs themselves.

The Examiner reported the question as to a lien on the part of the administrator de bonis non of the Henry W. Whittemore estate upon locus for the payment of his debts.

Service of process was made on him and he now appears and claims such lien.

Even granting that the debts proved before the Commissioners are not barred by any statute of limitations, and that the administrator is the proper and only person who can maintain such a lien, (*Putney v. Fletcher*, 148 Mass. 247), it still does not seem to me that the lien can be maintained in this case.

It is the policy of the law to secure the settlement of estates of deceased persons within the two years ordinarily allowed for that purpose, and that the real estate of the deceased may be held by his heirs or devisees after that time by a clear and marketable title. *Lamson v. Schutt*, 4 Allen, 359. It has been the immemorial policy of our law to keep real estate within the control of the living, and as far removed as possible from the power of the dead hand. Our courts have gone far in limiting a power of sale to an executor or administrator under a will to the immediate necessities of such settlement of the estate within the prescribed time. *Allen v. Dean*, 148 Mass. 594.

So far as the power of sale by statute is concerned, the question of a real living debt is essential. An administrator must plead the statute of limitations in favor of the heirs. *Lamson v. Schutt*, 4 Allen, 359. Indeed the actual existence of such indebtedness is a jurisdictional fact. *Tarbell v. Parker*, 106 Mass. 347. And even though, under the statute of 1874, the adjudication of the probate court as to the existence of such debts is made final, it seems to be questionable whether the court can affirmatively adjudicate its own jurisdiction. See the comment of Judge Fuller on that statute. Fuller's *Probate Law*, p. 272, (2d ed. p. 293), *Thayer v. Winchester*, 133 Mass. 447.

Whether or not the debts in this case, although not barred by statute, can be said to be real debts, for which a lien should exist enforceable at this late day against newly dis-

covered assets, such as property fraudulently conveyed by the intestate, or a bond for a deed in his favor, *Welsh v. Welsh*, 105 Mass. 229, *Glines v. Weeks*, 137 Mass. 547, I am of the opinion that no such lien can exist on property which was as much a part of the estate of the intestate in 1869 as it is to-day, and just as available then as now to the administrator; especially in view of the knowledge of the administrator *de bonis non* in 1891 of the existence of Henry W. Whittemore's share in the reversion in the widow's dower. *Lamson v. Schutt*, 4 Allen 359. *Aiken v. Morse*, 104 Mass. 277.

Decree for the petitioner.

Foster & Dennett for petitioner.

H. R. Bygrave for respondent.

JENNIE M. KIMBALL, PETITIONER.

Middlesex, March, 1902.

*Condition — Observance Prevented by Act of Third Party
— Forfeiture.*

The deeds in this title have for many years been made upon condition that "the aforesaid grantees, their heirs and assigns, shall forever maintain and keep open on said premises a certain water course or drain now running there."

At the time this condition was first imposed upon the property there was an open brook running across the premises, the location of which is shown upon the plan; but later the City of Somerville, on a petition in reference to said drain or water course, voted to construct a brick sewer there, and such a sewer was accordingly constructed, enclosing the former water course. This action was intended to be taken under the authority of a statute which had, however, previously been repealed.

In all deeds subsequent to the one in which it was originally imposed, the provision is clearly intended merely as a recital of fact, and not as the reimposition of a new condition, and all of the heirs of the grantor in the original deed have been served with notice of these proceedings. Several have appeared.

Under the circumstances a waiver of the breach can fairly be argued. But it seems to me that regardless of waiver, there can be no forfeiture. There is no forfeiture where performance is prevented by act of God. *Merrill v. Emery*, 10 Pick. 507. *Parker v. Parker*, 123 Mass. 584. Nor where non-performance is the result of an act of the Legislature.

Mahoning County *v.* Young, 16 U. S. App. 253. Scovill *v.* McMahon, 62 Conn. 378. Doe d. Anglesea *v.* Rugeley, 6 Q. B. 107.

It is said that in this case performance of the condition was not prevented by act of the Legislature, but by reason of an incorrect assumption as to the law. Where one relies on his own understanding of the law, he does so at his peril, and if he makes a mistake his mistake is none the less willful. Perhaps in such a case he cannot ask relief from the penalty of forfeiture, and must abide by the consequences of his error. Hancock *v.* Carlton, 6 Gray, 39, 58. But that is not the situation here. Whether forfeiture will be permitted where the act or neglect is that of a third party claiming under the owner, or for whom the owner can be considered responsible, seems to be a question. The point was raised and argued in Indian Orchard Co. *v.* Sikes, where the act was that of a lessee, though done without the knowledge or consent of the owner. There were other questions involved in that case, however, and the Court without giving any opinion, simply ordered judgment on the verdict. Indian Orchard Co. *v.* Sikes, 8 Gray, 562. In the case at bar the breach was caused by the act of the City, claiming not under, but against the owner; an act which whether authorized by Statute or not, was nevertheless an act of the public authorities over which the owner had no control. "It would be inequitable to permit forfeiture." Mactier *v.* Osborn, 146 Mass. 399. Hancock *v.* Carlton, 6 Gray, 39. Lundin *v.* Schoeffel, 167 Mass. 465. Pomeroy, Equity Juris. 451. The breach was absolute. The act of the city must be deemed in preventing compliance with the condition to have thereby terminated it, and with it, the right of reverter.

Decree for petitioner.

STEPHEN A. HAYES, PETITIONER.

Middlesex, April, 1902.

Voluntary Trust — Termination by Reconveyance.

In this case Emeline Rice conveyed locus on November 10, 1899, to Frederic D. Merrill, "in trust for the purposes set forth in a certain instrument of even date." The declaration of trust was not recorded. April 4, 1900, Merrill, reciting the above deed to him from Rice and further reciting "which trust I have declined and do absolutely decline to accept," conveyed the premises back to Rice, and June 7, 1900, Rice conveyed to the petitioner. The unrecorded declaration of trust has been filed in this court and declares that the trustee "shall maintain, support and care for the said Emeline Rice during the term of her natural life, and upon her decease, pay the expenses of her funeral," take her to his own home and provide her there with a suitable room, food, clothing, etc., "and at her decease turn over whatever of her estate so conveyed may then remain in my hands and possession to her executors or administrators."

In making the reconveyance from the trustee to Mrs. Rice, the parties were attempting to get within the case of *Loring v. Hildreth*, 170 Mass. 328; but, as a matter of fact in this case the deed was delivered, and the trust accepted and partially executed, the trustee taking the settlor to his house and there supporting her for some time, and instead of a case of failure of trust, which was *Loring v. Hildreth*, this is a case of attempted revocation or determination.

The Examiner is troubled by the doctrine of the recent

cases of *Young v. Snow*, 167 Mass. 287, and *Danahy v. Noonan*, 176 Mass. 467. The principle of those cases, however, is that a court of equity will not interfere to determine the provisions of a trust once properly created capable of execution and not fully accomplished, especially against the will of any interested party, even though it be only that of the dead settlor. And so with revocation; as said by the Lord Chancellor in the old case of *Villers v. Beaumont*, 1 Vern, 100; "This Court will not loose the fetters he hath put on himself, but he must lie down under his own folly."

In this case, however, the aid of no court is invoked, and no one's rights are affected except those of the settlor herself. Just what would have happened if the trustee in *Young v. Snow*, instead of assenting that the trust should be terminated by the court, had conveyed the legal title to all the beneficiaries, it is perhaps useless to inquire. It may be that it could be said that the legal and equitable estates had not merged, because of the right of the dead man to make his will and have his will carried out, which the court there upholds.

The Examiner suggests that possible creditors or presumptive heirs of Mrs. Rice may be considered as beneficiaries under this declaration of trust. They are not so named, however, nor is there any implication of any trust for the benefit of anybody except the settlor herself. In *Lovett v. Farnham* it is said that "in this Commonwealth it is settled that a voluntary trust completely established, with no power of revocation reserved, cannot be revoked or set aside at the will of the person by whom and with whose property it was set on foot." But this is as against anyone having an interest, legal or equitable, thereunder. In *Lovett v. Farnham*, and in all of the cases therein cited, there were distinct equitable estates created. *Lovett v. Farnham*, 169 Mass. 1.

In both *Young v. Snow* and *Danahy v. Noonan*, *supra*,

there was a legal estate outstanding, with an interest or a duty attached thereto, which the holder could not be forced to part with. In the case at bar it may be questioned whether the trust was ever anything but a perfectly dry trust which the settlor had the right to revoke at any time, like the first draft of the trust-deed in *Keyes v. Carleton*, 141 Mass. 45. She had at all events the only interest in, the only rights over, and the full power of disposal of, the equitable estate. The holder of the legal title could, and did, convey that to her also. The estates merged, and the trust determined.

Decree for petitioner.

EDWARD B. SWIFT, PETITIONER.

Plymouth, June, 1902.

*Husband and Wife — Statutory Heir — \$5,000 Estate —
Set Off by Probate Court Under Revised Laws.*

Title to a portion of the property involved in this case comes under a set off by the Probate Court under the so-called “\$5,000 Statute.” The examiner questions the validity of the set off because it was made after the enactment of the Revised Laws in which no provision was made for such proceedings, and before the passage of the remedial act which has just passed the Legislature.

The \$5,000 estate created by Chapter 211 of the Acts of 1880, and provided for in the Public Statutes, Chapter 124, as amended by Chapter 255 of the Acts of 1885 and Chapter 290 of the Acts of 1887, was discontinued by Chapter 450 of the Acts of 1900. There had been an attempted repeal of it by Chapter 479 of the Acts of 1899, which was intended to take effect April 1, 1900. The operation of this last act was, however, by Chapter 174 of the Acts of 1900, extended to January 1, 1901, and then later by Chapter 450 of the Acts of 1900 it was repealed altogether before it had ever taken effect. The time for the taking effect of all except Section 11 of Chapter 450 of the Acts of 1900 was in the meantime extended, by Chapter 461 of the Acts of 1901, to January 1, 1902.

After January 1, 1902, therefore, no new \$5,000 estates can arise. Prior to January 1, 1902, however, many such estates had already been created, and such estates so created are declared to be vested, inheritable estates, descending to

the husband or wife as "Statutory heir," defined by value until duly set out, and in that condition inheritable, deviseable or saleable like any other estate. *Lavery v. Eagan*, 143 Mass. 389. *Eastham v. Barrett*, 152 Mass. 56.

Under the Public Statutes such estates could be set off by the Probate Court on petition therefor by any person in interest. Public Statutes, Chapter 124, Section 17, amended by Chapter 234 of the Acts of 1889, amended again by Chapter 170 of the Acts of 1894. By Chapter 227 of the Revised Laws the whole of the Public Statutes as such were repealed, and also Chapter 234 of the Acts of 1889. Chapter 170 of the Acts of 1894, however, was not expressly repealed by the Revised Laws, but is marked therein "superceded."

On the passage of the Revised Laws, therefore, the machinery for assigning and setting out estates, created under the \$5,000 statute was apparently discontinued, although the estates themselves continued in existence. This difficulty has been remedied by the passage of Chapter 482 of the Acts of 1902, declaring that the provisions of Chapter 170 of the Acts of 1894 (marked as above noted, "superceded") are, nevertheless, "in full force and effect" in respect to claims to an estate in fee to which a surviving husband or wife was entitled on or before December 31, 1901, under the \$5,000 statute. I think that this is a declaration by the legislature of the status of the provisions for a set off of such estates between the time of the passage of the Revised Laws and enactment of Chapter 482 of the Acts of 1902, and that a set off by the Probate Court between those dates was valid.

Decree for petitioner.

FRANCIS P. McMANUS, PETITIONER.

Suffolk, July, 1902.

Executory Devise — Power of Alienation — Release.

By the will of Mary Ann McManus, late of Boston, the property in question in this case was devised to her son, the petitioner, "to him, his heirs and assigns forever, subject however to this condition, namely, that should he, upon attaining the age of thirty-five years, find himself without legal issue, and, which may God forbid, prove to be a man abandoned to evil courses and a spend-thrift, then this devise to become null and void. In the event of him so proving, being at the time moreover without legal issue as aforesaid, I give, bequeath and devise the said real estate to my said beloved brother, Rev. Thomas F. Shannon, to him, his heirs and assigns forever." April 12, 1901, Father Shannon quit-claimed to the petitioner all right, title and interest of whatsoever nature in said estate. The petitioner is not yet thirty-five years of age. The Examiner in reporting on the question of the sufficiency of this release has added to his own opinion in the matter a valuable review of the authorities.

The interest devised to Father Shannon was clearly not a remainder, but an executory devise. *Brattle Sq. Church v. Grant*, 3 Gray, 142. The question then is was the deed from Father Shannon to the petitioner sufficient to release this interest.

In *Brattle Square Church v. Grant* it is said at page 148, "the grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation and thus contravene the policy of the law which aims to secure

free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitations over being executory and depending on a condition or event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title because it is wholly uncertain in whom the estate will vest, on the happening of the event or breach of the condition upon which the ulterior gift is to take effect." And on page 152, "Executory devises in their nature tend to perpetuities because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery or otherwise."

At common law if the executory devisee dies before the event happens, the estate goes to the person who is heir at the time of the event, and not to the person who is heir at the time of the death of the devisee. *Goodright v. Searle*, 2 Wils. 29. *Barnitz v. Casey*, 7 Cranch 456, at 470. *Whitney v. Whitney*, 14 Mass. 88. Under this rule it could not be determined until the happening of the contingency who would take the estate. "The happening of the contingency determines who is to take the estate, and until that time no one has an interest to transmit." *DeWolf v. Middleton*, 18 R. I. 810.

The language quoted from the opinion in *Brattle Square Church v. Grant* was obviously written with regard to the general principles of the common law, rather than to the situation under the Massachusetts statutes. It is provided by our statutes that "If a contingent remainder, executory devise or other estate in expectancy is so granted or limited to a person that in case of his death before the happening

of the contingency the estate would descend to his heirs in fee simple, he may before the happening of the contingency sell, assign or devise the land subject to the contingency." Revised Laws, Chap. 134, Sec. 2. Revised Statutes, Chap. 60, Sec. 30.

It may however be said that the executory devise in this case would not descend to the heirs of Father Shannon, and that therefore this statute has no application; but in this State the common law of descent has also been changed. "When a person dies seized of land, tenements or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend subject to his debts, etc." Revised Laws, Chap. 133, Sec. 1. Revised Statutes, Chap. 61, Sec. 1. Under the latter statute contingent interests descend like vested interests. *Whitney v. Whitney*, 14 Mass. 88. *Winslow v. Goodwin*, 7 Met. 363. *Dalton v. Savage*, 9 Met. 28. *Welsh v. Woodbury*, 144 Mass. 542. This results in bringing such an interest as that in the case at bar within the provisions of R. L. Chapter 134. *Winslow v. Goodwin*, 7 Met. 363. *Taylor v. Blake*, 109 Mass. 513. *Putnam v. Story*, 132 Mass. 205. *Cummings v. Stearns*, 161 Mass. 506. The apparent confusion existing under some of the decisions on this statute, and Mr. Crocker's vigorous notes thereon, do not touch the particular question involved in this case. Crocker's Notes on Common Forms, 4th ed., p. 30. Crocker's Notes on Rev. Laws, p. 400.

It is clear that in *Brattle Square Church v. Grant* the Court forgot that the contingent interest could have been released under the statute, and therefore "a single ambiguous or inaccurate expression has sometimes led to a misunderstanding of the law intended to be stated" in that case. *Winsor v. Mills*, 157 Mass. 362, 365.

Decree for petitioner.

FRED E. BAKER, PETITIONER.

Essex, August, 1902.

Mortgage — Equitable Mortgage — Assignment and Discharge.

A full warranty deed of locus was given and recorded in 1885; and executed contemporaneously with the deed, but not recorded until after the death of the grantee nine years afterward, was an agreement for reconveyance upon payment of a certain note. With the agreement for reconveyance was also recorded an assignment of mortgage in ordinary form, referring to the deed by book and page as if it were a mortgage, executed by the executrix of the grantee; and a discharge of mortgage in ordinary form is now offered by the assignee thereunder.

In one sense, and so far as making title under it is concerned, an equitable mortgage can only be regarded as a conveyance in fee, although made under such circumstances that a court of equity would impress a trust upon the title. As between the parties, however, such a transaction constitutes a mortgage, pure and simple. *Tilden v. Greenwood*, 149 Mass. 567 at 569; *Short v. Caldwell*, 155 Mass. 57.

Being a mortgage, the mortgagor is entitled to pay his debt to the lawful holder thereof, and such holder may discharge the mortgage. In the case of an ordinary mortgage upon payment of the debt the mortgagee's estate fails by the very terms and condition of the conveyance to him, and the mortgagor is in as of his old estate. In the case of an equitable mortgage, there is no such provision. The real estate, nevertheless, is none the less conveyed solely as se-

curity for the debt, and is held for that purpose only. It would seem from some of our cases as though it might be said that the property is conveyed to the mortgagee to the use of the holder of the mortgage debt; and that whatever assignment is sufficient to transfer the debt, will, of necessity, carry the mortgage title with it, so far, at least, as the power to discharge the mortgage is concerned. In *Hills v. Eliot*, 12 Mass. 26, the assignment was of the debt only, and not of the estate; but it was held that the language showed the intent to assign the mortgagee's interest in the land as well; and that generally by such assignment it is intended to put the assignee in the place of the mortgagee. In *Cutler v. Haven*, 8 Pick, 489, there was a delivery of the mortgage deed and note, together with a power of attorney to enforce payment of the debt, but no assignment of the mortgage. The court held that this constituted an equitable assignment, and that the equitable assignee holding the mortgage deed and the power of attorney to collect the debt, might have received the debt, delivered up the note, and cancelled the mortgage. In *Barnes v. Boardman*, 149 Mass. 106, there were no words of inheritance in an assignment. The court says, however, that the assignment included an absolute title to the mortgage debt, and that it is in consonance with the true relation of the parties and with substantial justice to hold that such an assignment is sufficient to vest in the assignee the full legal title of the mortgagee to the mortgaged premises.

Under *Tilden v. Greenwood* and *Short v. Caldwell*, *supra*, it would seem that, as between the parties, an equitable mortgage must be considered to be an ordinary mortgage for all purposes, statutory or otherwise. In *Short v. Caldwell* there had been a conveyance by deed absolute, a separate bond of defeasance not recorded until years afterwards, and the mortgagee had meantime died, all as in the case at bar. A petition was brought under the statute of 1882 to clear the

record title from an undischarged mortgage, and the heirs-at-law of the mortgagee, who were out of the State and not served with process, appeared specially and objected that the transaction did not constitute a "mortgage" within the meaning of the statute. The court held that as between the parties the relation was the same as if the mortgage had been in the ordinary form, and ordered a decree for the petitioners.

If one holding title under the mortgagor in an equitable mortgage can avail himself of one statutory method of discharging such mortgage from the record, he may surely avail himself of another. The provisions in Public Statutes, Chapter 120, Section 24, that a mortgage may be discharged by an entry made on the margin of the record and signed by the mortgagee or by his executor or assignee, and that such entry shall have the same effect as a deed of release duly acknowledged and recorded, would seem to be peculiarly applicable to the present case; and on such marginal discharge made on the margin of the record of the deed by the assignee of the mortgage, there may be a decree for the petitioner.

So ordered.

NOTE:— The rule adopted in the following case was disapproved in a dictum to be found in the case of *Lemay v. Furtado*, 182 Mass. 280, decided in November, 1902, and more specifically in dicta in the later cases of *Gray v. Kelley*, 194 Mass. 533 and *Hamlin v. Atty. Gen.*, 195 Mass. 309. On the other hand it was apparently approved in *Haskell v. Friend*, 196 Mass. 198, 201. The whole matter was then fully considered in *Gould v. Wagner*, 196 Mass. 270, and the rule which had theretofore prevailed in the land court definitely repudiated. The exact scope and effect of the decision in *Gould v. Wagner* is however seriously questioned in the dissenting opinion filed in that case, and it is to be noted that the ruling of the land court which was therein sustained was based on a finding of intent to limit the grant to the middle line of the way. The following case must therefore be deemed to be overruled, but is nevertheless printed for whatever value there may be in the discussion of the citations which it contains.

JOHN F. McNAMEE *v.* WILLIAM A. GASTON ET
AL., TRUSTEES.

Suffolk, September, 1902.

*Way — Deed — Boundary — Grant Bounding on Way
Held to Include Fee to Entire Width of Way.*

The title in this case shows that in 1825 one Ammi Cutter owning a rectangular tract of land on Charter Street, Boston, erected thereon a block of four houses facing on Jackson Avenue, a private way running Northerly from Charter Street, with a four foot passageway on the end and rear

of the block, and between it and the adjoining lands of his neighbors. This passageway was entirely on his own land and he owned no land on the farther side of it. Situated in the rear passageway, at about the middle block, and jutting out some six feet into the two inside house lots, was a well. No plan was recorded nor is any referred to in the deeds, but a sketch by the Examiner showing the several deed lines is filed with his report.

In 1825 Cutter sold off one of the inside house lots describing it as a parcel of land with a new house thereon, and bounding it Southeasterly "on said passageway seventeen feet, thence turning and running Northerly on a sloping line five feet two inches, thence bounded Northeasterly through the center of a brick partition wall there measuring thirty-five feet." These measurements would be by the inside lines, and taken by themselves would exclude the well and passageway.

In 1852 the remaining estate of said Cutter was conveyed to one Charles E. Trott, who, in the same year, conveyed away the several lots to different purchasers, describing them merely as dwelling houses, and bounding them respectively "on said passageway," and by measurements, which, as in the case of the first lot sold, would, taken by themselves, exclude both well and passageway.

In all the deeds there was a further grant of a right of way over both passageways.

In 1853, the predecessors in title of the respondents, owning the end house in the block farthest from Charter Street, obtained from the owners of the other house lots a deed of release of all right, title and interest in the portion of the two passageways on which the respondent's lot abuts. In 1896 the respondents obtained from the heir of said Charles E. Trott, deceased, a deed of release of all of the original tract owned by him, except what had theretofore been sold.

The petitioners own the house and lot on the corner of

Charter Street and the passageway, and claim to own the fee in the whole of the adjoining way, subject to the easements of the other lot owners therein. The respondents own the end house and lot farthest from Charter Street, and claim to own the fee in the Easterly half of the way adjoining the petitioner's land under their deed of 1896, admitting the title of the petitioner to the middle of the way, and an easement in his favor over the whole.

The sole question in this case is, therefore, whether under his deeds, the petitioner took title to the center of the passageway only, or clear across to the opposite boundary.

This question is one as to which there is no direct decision in Massachusetts nor is much help to be derived from the decisions in the cases most nearly analogous.

The nearest case is, of course, that where the question is whether the fee carries to the nearest side line only, or to the center, of a street or way, and the reason usually given for the Massachusetts rule that the fee will be presumed to carry to the center of the way unless there be strong language in the deed to rebut it, is that a street or way is for this purpose an abuttal, and that where a monument which has width, as a way, a river, a ditch, a wall, or a fence, is used for a boundary, the law implies that where no other line is expressly fixed, it is the middle line of such monument which is the boundary. The boundary is said to be the *filum viae*, just as it is the thread of the stream. *Newhall v. Ireson*, 8 Cush. 595. *Phillips v. Bowers*, 7 Gray, 21. *Smith v. Slocomb*, 9 Gray, 36. *Peck v. Denniston*, 121 Mass. 17. This is a result, however, rather than a reason. It is not a fixed rule of law like the Rule in Shelley's Case, but merely a rule of construction adopted in the absence of better evidence, as best determining the intention of the parties. *Motley v. Sargent*, 119 Mass. 231. *Crocker v. Cotting*, 166 Mass. 183.

All of the Massachusetts cases which adopt the *filum viae*

rule are cases either where the grantor owned lots on both sides of the street or way, or where the way was a division line; and the reason underlying the rule adopting the *filum viae* as the line presumed to be in accordance with the intent of the parties, seems to be, that while the fee may be of value to the grantee, it can be of little or no value to the grantor; that the grant of the easement over it has taken away all that can be serviceable to the owner; and that what is left is at best a bare, naked legal title in an isolated narrow strip or ribbon of land stretching between the estates of third parties, not only valueless in itself to the owner, but held practically in trust for the benefit of the abutters who derive title through him, and which cannot be used for any purpose in derogation of their rights, even to the extent of imposing any additional burdens or easements upon it. Under these circumstances to leave the fee in the grantor is to leave it practically in abeyance, which is contrary to the policy of the law. *Smith v. Slocumb*, 9 Gray, 36. *Clark v. Parker*, 106 Mass. 554. *Greene v. Canny*, 137 Mass. 64. *Gould v. Eastern Railroad*, 142 Mass. 85.

The same reasoning applied to the case at bar would not stop the fee in the lots sold off by the common grantor at the center of the way, leaving just such a narrow strip remaining in his heirs, but would carry the lots across the way to the lands of the adjoining owner. This is clearly brought out in the Rhode Island case of *Healey v. Babbitt*. The rule to the center rests on the assumption that the way is laid out between two separate tracts of land, one-half on each; and the same considerations of policy which have led to the rule of construction that the fee carries to the center of the way where the grantor owns to the center, are applicable to carry the fee across the way where the grantor owns so far and no farther. *Healey v. Babbitt*, 14 R. I. 533. *Haberman v. Baker*, 128 N. Y. 253. *Taylor v. Armstrong*, 24 Ark. 102. *Re Robbins*, 34 Minn. 99.

Of course this presumption as to the intention of the parties may be controlled by the language of the deed, or by the circumstances of the transaction. A grantor can readily limit his grant to the side of the way and retain the fee in himself, by using apt language therefor. *Smith v. Slocomb*, 9 Gray, 36. *Brainard v. B. & N. Y. C. R. R.*, 12 Gray, 407. *Codman v. Evans*, 1 Allen, 443. *Treat v. Joslyn*, 139 Mass. 94. *Crocker v. Cotting*, 166 Mass. 183.

Such the respondents contend is the effect of the language used in the case at bar, and they call attention first to the measurements in the deed, which would exclude both well and passageway, and especially to the line of the jog as resembling the elbow in *Codman v. Evans*. And they further argue that there is a separate grant in all of the deeds of a right of way over both passageways, which, in the case of their own lot, was certainly superfluous as to the way on the North, if the entire fee in that way passed to the grantee under his deed of the house lot. They say that in such case there should have been a reservation rather than a grant of the easement. Measurements, however, are usually, naturally, and almost necessarily, made by the inside lines, and the fact of such measurements is not of itself sufficient to overcome the ordinary presumption against an intent to retain the fee. So far also as the grant of a right of way in the passageways contained in the deeds other than that of the respondents' is concerned, it is to be construed as a grant, and a necessary one, of an easement over so much of the passageway as was not included in each particular deed. Both of these arguments were fully considered in *Motley v. Sargent and Gould v. Eastern Railroad*, and see also *Peck v. Denniston*, *supra*.

I am of opinion that no sufficient reason or intent to withhold the fee in a narrow, isolated and valueless ribbon of land, consisting of the farther half of a four foot passageway, appears from these deeds, but rather that the deeds

of the respective lots carried the fee therein clear across the passageway.

So far as the petitioner's lot is concerned, there may be a decree accordingly.

R. L. Fortney for petitioner.

G. A. Sawyer for respondents.

ASHER F. BLACK, PETITIONER.

Middlesex, October, 1902.

Mortgage — Invalid Foreclosure — Purchase by Husband of Mortgagee — Assignment by Wife to Husband.

Title in this case is claimed under the foreclosure of a mortgage. At the time of the foreclosure the mortgage was held by a married woman who, having first entered on the premises under Public Statutes Chap. 181, sec. 1 and 2, then made, or attempted to make, a sale under the power in the mortgage to her husband, who was the highest bidder at the sale. The attempted foreclosure by sale was invalid however, by reason of failure to publish notice in the County of Suffolk as required by the terms of the mortgage.

If the foreclosure sale had been valid there would have been no difficulty because of the relationship of husband and wife between the purchaser and the mortgagee. The sale in that event would have been merely the exercise of a power, a conveyance by the mortgagor through his duly authorized attorney; not in any sense a conveyance by the wife, nor an assignment of her mortgage. *Hall v. Bliss*, 118 Mass. 554. *Hermanns v. Fanning*, 151 Mass. 1, 5. The sale being invalid, it is argued that it nevertheless operated as an assignment, and inured, with the benefit of the entry, to the purchaser. Here, however, the relationship of husband and wife is fatal. It is familiar law that where a foreclosure by sale fails by reason of informality, the deed to the purchaser will, nevertheless, if in apt form therefor, operate as a conveyance of the mortgagee's estate, and an assignment of the mortgage debt; and the prior entry, and

the estate eventually acquired thereunder, will inure to the benefit of the ultimate holder of such mortgage title. *Brown v. Smith*, 116 Mass. 108. *Dearnaley v. Chase*, 136 Mass. 288.

In this case, however, the deed, being a deed between husband and wife, is absolutely void, either by way of assignment of debt, conveyance of the mortgagee's estate, or foundation for subsequent title by estoppel. *National Granite Bank v. Whicher*, 173 Mass. 517. P. S., C. 147, Sec. 3 — R. L., C. 153, Sec. 3. *Townsley v. Chapin*, 12 Allen 476. *Mason v. Mason*, 140 Mass. 63. (Note, and see *Graves v. Broughton*, 185 Mass. 174.)

The Massachusetts cases cited in Jones, Real Property, Sec. 45, are cited solely in regard to the equitable rights of creditors or heirs in cases of conveyance between husband and wife through a conduit. None of them are cases of direct conveyance, nor are they intended to be cited as such.

Title is, therefore, not in the petitioner, but in the mortgagee under her entry. A deed must be obtained from her before there can be registration in the petitioner.

So ordered.

DOLLY S. PARKS, PETITIONER.

Worcester, December, 1902.

*Agreement to Assume Mortgage — Equity — Estoppel —
Laches.*

Locus in this case is made up of two lots, shown by the Examiner on his plan as "A" and "B." In 1867, one Gardner, the then owner of both lots, mortgaged them for the sum of \$1,000 to one Wilson, and later in the same year, conveyed lot "A" to one Parks, subject to the mortgage, which was recited as covering both the Parks' lot "A" and the adjoining lot "B," and which said Parks assumed as a part of the consideration for his deed. In 1874 Parks defaulted payment of the mortgage and surrendered possession for the purpose of foreclosure under G. S., Ch. 140, Sec. 2; the mortgagee also recording an evidence of possession by certificate of witnesses. About a week after the expiration of the time limited for redemption, the mortgagee, for the consideration of \$1,613.66, conveyed the mortgaged premises to a son of said Parks, who, on the same date and by an instrument recorded simultaneously with the deed to him, quitclaimed to Parks. The petitioner is residuary devisee under the will of said Parks.

The Examiner reports adversely on the title on the ground that the petitioner as claiming under Parks is estopped, by reason of his agreement to assume the mortgage, to assert a title by its foreclosure; and relies on *Probstfield v. Czizek*, 37 Minn. 420. This unpronounceable Minnesota case, however, was one in which the grantee of a deed made under similar circumstances was seeking the aid of the court to

put him into possession, as against his grantor, of the property which he had acquired by foreclosure proceedings made in violation of his agreement. So in Massachusetts, one who is under an obligation to pay a mortgage will not be permitted to acquire the mortgage title and assert it against those toward whom, or for whose benefit, it was his duty to pay it. An assignment to him will be held to operate as payment. *Tucker v. Crowley*, 127 Mass. 400. *Thompson v. Heywood*, 129 Mass. 401. And see *Jager v. Vollinger*, 174 Mass. 521.

But in the case at bar the petitioner is neither seeking to enforce the mortgage debt, nor to secure possession of the mortgaged premises. She is already in, and has been for over twenty years, claiming as a purchaser for value. Whatever the rights or relations between the parties arising under the agreement in the Parks deed, lot "B" was always subject to the Wilson mortgage, and liable to foreclosure by the mortgagee. Foreclosure took place and the title passed. Whatever equities Gardner may have had by virtue of which a Court would, if seasonably invoked, have held Parks or his devisee estopped from prosecuting any action under his title so acquired, must be held at this late day to have been lost by laches. For all that now appears the breach of agreement may have been actually satisfied or waived years ago. Such at least is a fair presumption. The legal title cannot remain clouded indefinitely by what is at most a mere right to assert an equity.

Decree for Petitioner.

CHARLES G. WOODBRIDGE ET AL., v. DORA S.
JONES ET AL.

Essex, December, 1902.

Devise — Life Estate — With Power of Disposal in Fee.

The petitioner in this case claims title by deed from Sarepta Twiss, the devisee named in the following clause of the will of William H. Twiss, "I devise and bequeath all the rest and residue of my estate, both personal and real, to my wife, Sarepta Twiss, during her life to use and dispose of the same as she thinks proper, with remainder thereof on her decease to," the respondents.

The question at issue is whether this is to be construed as a devise in fee with an invalid attempt to limit a remainder thereafter, or a devise for life with power of disposal in fee, or merely a devise for life with remainder in fee to the respondents.

An examination of the many cases cited by counsel shows that most of them may be readily divided among three classes.

First, those in which there is a clear devise either of an absolute fee or of an express power of disposal in fee. *Kuhn v. Webster*, 12 Gray 3. *Hale v. Marsh*, 100 Mass. 463. *Kelly v. Meins*, 135 Mass. 231. *Welsh v. Woodbury*, 144 Mass. 542. *Hoxie v. Finney*, 147 Mass. 616. *Kent v. Morrison*, 153 Mass. 137. *Foster v. Smith*, 156 Mass. 379. *Baker v. Thompson*, 162 Mass. 40. *Collins v. Wickwire*, 162 Mass. 143. *Knight v. Knight*, 162 Mass. 460.

Second, those in which a power to convey has been implied from some such phrase used in the will as, "if any of my

said property shall remain" or, "all the estate, both real and personal that may remain." *Harris v. Knapp*, 21 Pick. 412. *Lyon v. Marsh*, 116 Mass. 232. *Burbank v. Sweeney*, 161 Mass. 490. *Chase v. Ladd*, 153 Mass. 126. *Ernst v. Foster*, 58 Kan. 438. *Burleigh v. Clough*, 52 N. H. 267. *Re Thomson's Estate*, L. R. 13 Ch. D. 144. *Wiley v. Gregory*, 135 Ind. 647.

Third, those in which the estate has been left for the "comfortable support" of the life tenant, or by some equivalent phrase, and a power to convey has been implied as necessary thereto. *Smith v. Snow*, 123 Mass. 323. *Bamforth v. Bamforth*, 123 Mass. 280. *Johnson v. Battelle*, 125 Mass. 453. *Gibbins v. Shepard*, 125 Mass. 541. *Yetzer v. Brisse*, 190 Pa. St. 346.

But few of these have any direct bearing on the case at bar.

The principal argument for the respondents is, that in a devise of both real and personal estate for life with remainder over, the life tenant cannot have the full beneficial use and enjoyment of the property intended by the testator without using up perishable articles, and that, therefore, the words, "to use and dispose of the same as she thinks proper," must be construed merely as enlarging her dominion over the estate to the extent of using up personal chattels, and perhaps also of immunity for waste. In *Russell v. Werntz*, 88 Maryland 210, this was the prevailing argument. But it is to be noted that the devise in that case was for life or during widowhood, with remainder, on re-marriage or death, to the testator's daughters. The same argument is somewhat elaborately used in *Smith v. Bell*, 6 Peters 68, but in that case the expression in the sale was "for her own use, benefit and disposal absolute." In *Giles v. Little*, 104 U. S. 291, the same argument was elaborately used, as also the argument from the fact that if the widow, who had money of her own, could defeat the remainder to the children, who were poor,

and then re-marry, she would defeat the whole purpose of the will. *Giles v. Little* was overruled, however, by *Roberts v. Lewis*, 153 U. S. 367. In *Enbank v. Smiley*, 130 Indiana 393, and *Logue v. Bateman*, 43 N. J. Eq. 434, the power of disposal was clearly limited to the personal estate only. *Jones v. Jones*, 66 Wis. 310, *Patty v. Goolsby*, 51 Ark. 61, and *Whittemore v. Russell*, 80 Maine 297, are cases, however, that are distinctly in point in favor of the respondents. In *Bryant v. Virginia Coal Company*, 93 U. S. 326, the expression used was, "to have and to hold during her life, and to do with as she sees proper before her death." The Court follows the general reasoning in *Smith v. Bell* and *Giles v. Little*, and further limits the power of disposal of the estate with which it is connected, namely, the life estate. But as pointed out by Chief Justice Peters in *Whittemore v. Russell*, *supra*, a power of disposal is necessarily incident to the estate and is in no way enlarged by such an expression. Indeed, a provision against alienation would be void; see *Todd v. Sawyer*, 147 Mass. 570. *Bryant v. Virginia Coal Company*, however, was not overruled by *Roberts v. Lewis*. In *Roberts v. Lewis*, the whole gist of the opinion turns upon the fact that the technical expression "remainder" was not used, and in the Nebraska case of *Giles v. Little* (25 Neb. 313), which is approved by the Court in *Roberts v. Lewis*, the phraseology of the will was "whatever may remain." In the case at bar the wording is "with remainder thereof."

The strongest case for the respondents, however, is *Lewis v. Shattuck*, 173 Mass. 486. Here the expression used was "for her own use and benefit during her own life, upon condition that she remains my widow, and that she is not to make a gift or donation out of said property to any of her heirs, or blood relations. I give, bequeath and devise to my lawful heirs all that remains of the property devised above to my wife, at her decease, or at her second marriage." The Court apparently construes the provision in regard to

gifts out of said property to the heirs or relations of the life tenant as being a limited power of disposition only, and that as to personal estate. Otherwise the case would be in direct conflict with the long series of cases in which a power of sale has been implied from the use of such expressions as, "all that remains," none of which, except *White v. Sawyer*, were considered by the Court in its opinion, or even cited (as appears from an inspection of their briefs) by the parties. In *White v. Sawyer*, 13 Met. 546, which was cited, there was no phrase indicating any power of disposition, except the bare expression after the gift of a pure life estate, "all that shall remain after the death of" the life tenant. In *Butts v. Andrews*, 136 Mass. 221, the question in issue was not as to the sufficiency of the power, but rather as to whether its terms had been so clearly complied with as to justify a decree for specific performance. In *Harris v. Knapp*, 21 Pick. 412, although the case turned principally on the phrase, "whatever shall remain," the language of Chief Justice Shaw in regard to the words, "for her use and disposal," is instructive. "The words for her use and disposal, applying as they do to the principal sum, would be wholly nugatory" if restricted to the interest.

Most of the cases cited for the petitioner are, as has been said, cases where a power of sale is either express, or was implied from phraseology very different from that used in the case at bar. In *Cummings v. Shaw*, 108 Mass. 159, the phrase, "with right to dispose of," was held to carry the power to convey an absolute estate, but in that case there was no devise over. In *Foster v. Smith*, 156 Mass. 379, the expression "for her to use" is said to be merely due to an over-anxiety to make it certain that the property should be wholly her own. In *Ernst v. Foster*, 58 Kan. 438, while the language of the Court is strongly in favor of the petitioner's contention, the reversion was in "what is not disposed of," and furthermore, that case turns almost entirely on the cir-

circumstances of the testator's family, a power of disposition being necessary to the widow's getting any advantage out of the estate. *Ford v. Ticknor*, 169 Mass. 276, is very near the case at bar, although the phraseology there used is undoubtedly somewhat stronger in regard to the power of disposal than is the case here. Power of disposal by deed seems to have been assumed by both Court and counsel (see their briefs), and the only matter discussed is as to whether the power was broad enough to give the life tenant, if not a fee, at least a power of disposal by will.

On the whole, but little assistance can be derived from the many authorities which have been examined. They all depend largely upon particular phraseology of the wills under immediate consideration. Reading this will in the case at bar by itself, it seems to me that it was the intention of the testator to give his wife a life estate with a power to dispose of all the property, both real and personal, should she think proper, and with remainder of whatever may be left to the respondents.

Decree for petitioners.

W. H. Niles for petitioners.

W. B. Grant and G. C. Richards for respondents.

Note: This case went to the Supreme Court and is reported in 183 Mass. 549.

FREDERICK J. FINNIGAN, PETITIONER.

Suffolk, December, 1902.

Execution Sale — Requisites to Validity.

The report in this case raises the question of what is necessary to the validity of a title acquired at execution sale. The examiner has abstracted the recitals in the sheriff's deed, but not the proceedings in court. This is not sufficient. The deed of the sheriff is no more evidence of the truth of the recitals therein contained, or of the legality or existence of the other facts necessary to the validity of a title by statutory process, than is the case with the deed of a tax collector; and it is as necessary to the case of the petitioner under an execution sale, as under a tax sale, to prove that everything has been done which, under the statute, is essential to validity. *Burke v. Burke*, 170 Mass. 499; *Frazee v. Nelson*, 179 Mass. 456. (Note: And see *Washington Bank v. Williams*, 188 Mass. 103.)

The validity of an execution may be attacked in any collateral proceedings. *Penniman v. Cole*, 8 Met. 496. *Delano v. Wilde*, 11 Gray 17. (Note: And see *Washington Bank v. Williams*, *supra*.) Recitals in a deed are always subservient to the facts as they appear by an examination of the records of the court, and misrecitals in a deed both yield to, and are cured by, the officer's return. *Arnold v. Reed*, 162 Mass. 438. *Welsh v. Joy*, 13 Pick. 477. *Hayward v. Kane*, 110 Mass. 273.

The officer's return is indispensable to the completeness and validity of the title. *Lawrence v. Pond*, 17 Mass. 433. *Walsh v. Anderson*, 135 Mass. 65. When duly made the

officer's return is unimpeachable. *Bates v. Willard*, 10 Met. 62. *Baker v. Baker*, 125 Mass. 7. *Sawyer v. Harmon*, 136 Mass. 414. While the officer's return cannot be contradicted, neither, on the other hand, can it be enlarged. The return itself must show that everything has been done that the statute calls for, and essential facts cannot be supplied by extrinsic evidence. The return itself must set forth all the facts necessary to the validity of the proceeding. The officer cannot pass upon the validity himself, that is for the court; and a general statement that every necessary detail was done "agreeably to law" is defective and invalid. Neither will a return suffice under which the proceeding might or might not be good; its validity must affirmatively appear. *Lancaster v. Pope*, 1 Mass. 86 (Per Sedgwick, J.). *Davis v. Maynard*, 9 Mass. 242. *Wellington v. Gale*, 13 Mass. 483. *Williams v. Amory*, 14 Mass. 20. *Litchfield v. Cudworth*, 15 Pick. 23. *Dooley v. Wolcott*, 4 Allen 406. *Dewey v. Tobey*, 126 Mass. 93. *Rand v. Cutler*, 155 Mass. 451. *Frazee v. Nelson*, 179 Mass. 456.

If the matters essential to validity are present, a sale will not be rendered void by reason of mere irregularities. *Chesboro v. Barme*, 163 Mass. 79. *Holmes v. Jordan*, 163 Mass. 147. *Tellefson v. Fee*, 168 Mass. 188. *Frazee v. Nelson*, 179 Mass. 456.

It must appear that the court from which the execution issued had jurisdiction, either over the defendant personally, or over the property by due attachment on mesne process. *Brayman v. Whitcomb*, 134 Mass. 525. *Stack v. O'Brien*, 157 Mass. 374. *Tellefson v. Fee*, 168 Mass. 188. In the case of an absent defendant, failure to file the bond required by R. L., Ch. 170, s. 8, renders the execution void. *Dingman v. Myers*, 13 Gray 1. *Pease v. Morris*, 138 Mass. 72.

The execution must be still vital at the time of the levy. *Penniman v. Cole*, 8 Met. 496. *Kennedy v. Dunclee*, 1 Gray 65. *Nowell v. Waitt*, 121 Mass. 554. (Note: Though

apparently provisions intended solely for the benefit of the debtor may be waived by him. See *Washington Bank v. Williams*, 188 Mass. 103.)

The levy must have been begun before the time when the execution was returnable. *Prescott v. Wright*, 6 Mass. 20. *Rand v. Cutler*, 155 Mass. 451.

An execution issued after the death of the judgment debtor, without his legal representatives having been brought into the case, is void. *Hildreth v. Thomson*, 16 Mass. 191. *Sigourney v. Stockwell*, 4 Met. 518. *Reid v. Holmes*, 127 Mass. 326. *Knapp v. Knapp*, 134 Mass. 353. But if the legal representatives have been cited in, execution may issue against them, and be levied on any real estate of which the deceased died seized, even in the hands of an innocent purchaser for value from his heirs or devisees. (Note: While any attachment there may have been is dissolved by the death of the debtor, a lien for his debts nevertheless continues under R. L., Ch. 178, s. 53. See *Dunbar v. Kelley*, 189 Mass. 390, and *Tracey v. Strassel*, 191 Mass. 187.) This liability to execution continues till barred by the laches of the creditor, and it is somewhat startling to a modern conveyancer to read in the early cases what seems to have been considered not unreasonable delay. *Gore v. Brazier*, 3 Mass. 523. *Wyman v. Brigden*, 4 Mass. 150. *Ramsdell v. Cresaey*, 10 Mass. 170. (Note: And see *Kelly v. Dunbar*, and *Tracey v. Strassel*, *supra*.) The suit must be properly brought in the first place however, and an administrator cannot waive his lack of due appointment, or his special statute of limitations. *Borden v. Borden*, 5 Mass. 67. *In re Allen*, 15 Mass. 58. *Thayer v. Hollis*, 3 Met. 369.

The execution must be levied by a competent officer, and the petitioner must show that he was an officer *de jure*. A sale by a constable is bad, because he cannot post the notification of sale under his levy as required by the statute, that taking him out of his jurisdiction. *Lewis v. Norton*, 164

Mass. 209. If an officer had adequate jurisdiction when the levy was begun, the proceeding may be completed even if he has gone out of office in the meantime. *Ingersoll v. Sawyer*, 2 Pick. 276. *Capen v. Doty*, 13 Allen 262. *O'Brien v. Annis*, 120 Mass. 143.

Prior to 1881 service of notice of the time and place of sale to the debtor by leaving a copy at the debtor's last and usual place of abode was not sufficient, but since the statute of 1881 that mode of service is good. *Parker v. Abbott*, 130 Mass. 25. Acts of 1881, Ch. 207. *Croacher v. Oesting*, 143 Mass. 195.

There must be no unreasonable delay in the proceedings. Unreasonable delay will render proceedings void. *Haskell v. Varina*, 111 Mass. 84. (Note: And see *Dunbar v. Kelly*, *supra*.) Just what is "unreasonable," however, would seem to depend, not so much upon the record, as upon the circumstances of each case; and if no rights appear to have been prejudiced, delay will not of itself invalidate a sale upon a levy properly and seasonably begun. *Inman v. Meade*, 97 Mass. 310. *Bell v. Walsh*, 130 Mass. 163. *Croacher v. Oesting*, 143 Mass. 195. (Note: And see *Tracey v. Strassel*, *supra*.) The execution itself may have been seasonably levied, but the return delayed, and legitimately, for a considerable period. *Prescott v. Wright*, 6 Mass. 20. *Prescott v. Pettee*, 3 Pick. 331. *Welsh v. Joy*, 13 Pick. 477. *Walsh v. Anderson*, 135 Mass. 65. *Firth v. Haskell*, 148 Mass. 501. (Note: And see *Fletcher v. Wrighton*, 184 Mass. 547.)

The deed must be recorded within three months in order to preserve a title that will take effect from the date of the original seizure as against intervening deeds or encumbrances. Otherwise the deed will stand like any other unrecorded deed. *Heywood v. Hildreth*, 9 Mass. 393. *Taylor v. Robinson*, 2 Allen 562. *Houghton v. Bartholemew*, 10 Met. 138. *DeWitt v. Harvey*, 4 Gray 486. *Owen v. Neveau*, 128 Mass. 427.

While the title passed by execution sale is generally the title which the debtor had at the date of seizure, prior to 1874 the mode of levying the execution depended on the nature of the debtor's interest at the time of the levy. This in the case of a sale of an equity of redemption was a serious matter, since the validity of the sale depended upon facts not necessarily of record, or even within the purchaser's knowledge or control. If as a matter of fact the mortgage had been paid, the execution sale would be void, though there was neither actual nor constructive notice to creditor, officer, or purchaser. As this was changed over thirty years ago, however, the matter is hardly one of live interest today. *Perry v. Hayward*, 12 Cush. 344. *Grover v. Flye*, 5 Allen 543. *Gardner v. Barnes*, 106 Mass. 505. Acts of 1874, Ch. 188.

The interest of the debtor at the time it is seized must be correctly described, however. An equity cannot be taken as a fee, nor a fee as an equity. The description of a larger interest will not, as in a voluntary conveyance, cover a lesser one; although conversely, the title coming by purchase against, instead of under, the debtor, a sale of right, title and interest will carry the record title good as against an unrecorded deed. *Webster v. Foster*, 15 Gray 31. *Cochran v. Goodell*, 131 Mass. 464. *Mansfield v. Dyer*, 133 Mass. 374. *Lafin v. Crosby*, 99 Mass. 446. *Wight v. Barnstable Bank*, 123 Mass. 183. *Hackett v. Buck*, 128 Mass. 369. *Woodward v. Sartwell*, 129 Mass. 210. *Cowles v. Dickinson*, 140 Mass. 373. *Frazee v. Nelson*, 179 Mass. 456. (Note: And see *Lyons v. Urgalones*, 189 Mass. 424.)

The description in the deed must correspond with that in the return. *Whiting v. Hadley*, 3 Allen 357.

A sale to the husband or wife of the debtor is void, because of the relationship between the parties. *Stetson v. O'Sullivan*, 8 Allen 321. (Note: And see *Livingstone v. Murphy*, 187 Mass. 315.)

A sale of land alleged to be fraudulently standing in the

name of a person other than the judgment debtor, though the deed itself be valid, is liable to be defeated by subsequent failure to bring action for possession. *Hunt v. Mann*, 132 Mass. 53. *Cunniff v. Parker*, 149 Mass. 152.

The burden thrown on a petitioner who claims under an execution sale has been greatly lightened of late, however, by the form of return adopted by the Sheriff of Suffolk as a matter of precaution against the somewhat sweeping covenants of a sheriff's deed, and now used in many of the sheriffs' offices. It is very full in form and covers almost all of the matters necessary to the validity of a sale.

CURTIS MANUFACTURING CO. v. CITY OF
WORCESTER ET AL.

Worcester, December, 1902.

*Easements — Prescription — Public User — When Adverse
— When to be Deemed Permissive.*

The individual respondents claim private, and the City of Worcester and the Attorney General appearing through the City Solicitor public, rights of boating, bathing, skating, shooting and fishing in the petitioner's millpond, with a particular right of access thereto by means of a way leading from one public road to another across the petitioner's mill yard by the edge of the dam.

The pond is a large artificial mill pond situated on lands of the petitioner and containing about sixty-five acres. From 1834 when the pond was created until within about twenty years, the locality was well out in the country and the shores of the pond were largely wild land. Now it is in a thickly settled part of a large manufacturing city, which has acquired a portion of the shores of the pond for park purposes. For over fifty years prior to 1900 every one who has wanted to do so has fished the pond, boated and skated on it, and bathed in it at any desirable point out of sight of the houses and highways. Owners of adjoining house lots have kept boats for their own use or for hire, and from 1880 to 1885 a steam boat made regular trips about the pond. For over fifty years persons going to and from the pond have made use of a foot path across the mill yard and over the dam. This path was built and maintained however by the owners

of the property, and they themselves have made daily use of it for mill purposes. For fifty years prior to 1900 Mr. Curtis, predecessor in title to the petitioner, lived close to and in view of the pond, knew of the above user, kept and used a boat himself, and sometimes joined the skaters expressing his pleasure at having them enjoy the sport. Prior to 1900 none of the user above stated interfered in any way with the use of the property by its owners. There was no evidence of any expressed claim of right on the part of any person making use of the pond or path, nor of expressed objection thereto by the owners. Since 1836 the owners of the pond have exercised or leased to others the exclusive right to cut ice there.

It is not necessary in this case to go very far into matters of custom, dedication or prescription, because, although each rests on a different, though not necessarily incompatible, principle, there is one common ground of defense against them all; namely, permission; using that word in its ordinary acceptation as signifying the leave or license allowed to others by one who claims dominion, and not in the sense used in the recent case of *Bassett v. Harwich*, 180 Mass. 585, of submission by one who, whether necessarily or unnecessarily, recognizes in others a right superior to his own title.

In the present case there is no evidence of any expressed claim of right on the part of the respondents, or of any express acquiescence on the part of the petitioner or its predecessor in title. But it is argued that mere user by the public, wholly unexplained, is sufficient to establish a right by prescription and to authorize a presumption of a grant; and counsel cite *Jones on Easements*, Section 186. The section in *Jones on Easements* in which this statement occurs, however, is a section dealing with the matter of burden of proof, and in the only Massachusetts case there cited (*Barnes v. Haynes*, 13 Gray, 188) it was found as a fact that the user was "as of right." This is clearly brought out

in the later cases which cite *Barnes v. Haynes*, particularly *McCreary v. Boston & Maine Railroad*, 153 Mass. 300.

A claim of right need not be expressed, and may be inferred or presumed from the circumstances of the case, but mere user for the requisite period, wholly unexplained, and not inconsistent with permission, is not sufficient to create a presumption of a claim of right, or to necessitate a finding of prescription. *Brace v. Yale*, 10 Allen, 441. *Kilburn v. Adams*, 7 Met. 33. *First Parish v. Beach*, 2 Pick. 60, note. *Hooten v. Barnard*, 137 Mass. 36. *McCreary v. Boston & Maine R. R.*, 153 Mass. 300. *Sprow v. Boston & Albany R. R.*, 163 Mass. 330. *Slater v. Gunn*, 170 Mass. 509. *Moffatt v. Kenny*, 174 Mass., 311 at 314. (Note: But see *Aikens v. N. Y., N. H. & H. R. R.*, 188 Mass. 547 at 549.) In *Bassett v. Harwich*, *supra*, the matter under consideration was the effect of an attempted, but invalid, dedication. When the Court says that, the "use by the public under such conditions, like a use wholly unexplained, if continued for twenty years, might be presumed to have been adverse," it obviously means that the circumstances in that case are sufficient to raise from the use made of the way by the public, a presumption of a claim of right regardless either of the matter of the attempted dedication, or any other explanation.

It does not seem to me that the circumstances in the case at bar are sufficient to warrant any presumption either of a claim of right on the part of the people who have made use of the petitioner's property or of acquiescence therein on the part of the petitioner and its predecessor in title. The matter is one of practical importance, because of the very marked change now taking place in this Commonwealth in regard to the exercise of exclusive private dominion over what has heretofore been open country. There is a decided difference between boating, shooting, fishing, bathing, skating and even habitually passing over open tracts and sea-

shore properties, and the exercise of any of these uses in more thickly settled communities. Change in the character of the property itself may materially affect the nature of the user. *Kilburn v. Adams, supra.* *Slater v. Gunn*, 170 Mass. at page 514.

Prescription really rests, not on any lost grant, but on estoppel. The lost grant is merely a fiction, and like all legal fictions, a palpable one. Moreover, it is an old fiction, and the lost grant was the older method of expressing what is today frankly put upon the ground of estoppel as a matter of public policy. A man must not be silent when he ought to speak. When the knowledge of, and acquiescence of the owner in, user by third parties under a claim of right is presumed, it is because he has unreasonably slept on his own rights. *Deerfield v. Connecticut River R. R.*, 144 Mass. 325, at 338. *Commonwealth v. Fisk*, 8 Met. 238 at 245.

But in the case at bar the user by the neighbors and the public did not for many years in any way interfere with the use by the owner of the property for his own purposes. Attempted prohibition on his part would have undoubtedly been deemed unreasonable, and would probably have been unsuccessful. The most persistent user of the pond was for skating. But no use of the ice was permitted that could conflict with the owner's expressed right to cut ice. This was the only use of the ice that had any value, and this right the owner exercised. When the time came when there was reason to assert complete dominion over the property, it does not seem to me that it can properly be said that that right was lost, because it had not been exercised when there was no reason for it.

And so in regard to the way claimed from road to road across the mill yard. The way was laid out for the convenience of the owner; the public used it as occasion required; the owner made no objection and had none; the public use was in no way inconsistent with the purpose for

which the path was laid out, nor could the public use, which was purely and passively permissive, be easily distinguished from the user which was actively and intentionally by license, and in accordance with the very purpose for which the path was constructed and maintained. This latter intent in itself negatives any intent to dedicate. That it should be used for travel between the two roads was a necessary part of the owner's own purposes and plan in laying it out. *Attorney-General v. Abbott*, 154 Mass. 323. *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 332. *Morse v. Stocker*, 1 Allen, 150. *Durgin v. Lowell*, 3 Allen, 398. *Fitchburg R. R. v. Page*, 131 Mass. 391. *Sprow v. B. & A. R. R.*, *supra*.

So far as the rights claimed on behalf of the public in general is concerned, there is the further difficulty that the use by certain persons, or a certain class of persons, for their own purposes, even if sufficient to establish rights in them either personally or as a class, or as appurtenant to their estates, would, nevertheless, not establish a right in the general public. *Lufkin v. Haskins*, 3 Pick. 355. *Sale v. Pratt*, 19 Pick. 191. *McCreary v. B. & M. R. R.*, *supra*. *Bourke v. Davis*, L. R. 44 Ch. Div. 110.

Decree for petitioner.

W. C. Mellish for petitioner.

A. P. Rugg for respondents.

NATHAN W. GOLDBERG, PETITIONER.

Suffolk, January, 1903.

Deed — Conditions Containing More Than One Cause for Forfeiture — Restrictions.

Title in this case comes under a deed given by the City of Boston to one Smith, April 19, 1860, which contained the following provisions: "And this conveyance is also subject to the following conditions: 1. All taxes or assessments which have been laid or assessed upon said premises previous to the execution of this conveyance shall be paid by said Smith, his heirs and assigns. 2. The front line of the building which may be erected on said lots shall be placed on a line parallel with said Springfield street. 3. The buildings which may be erected on said lots shall be of a width equal to the widths of the front of the lots delineated on Alexander Wadsworth's plan referred to below. 4. No dwelling house or other buildings, except necessary out buildings shall be erected or placed on the rear of said lots. 5. No building which may be erected on said lots shall be less than three stories in height exclusive of basement and attic, nor have exterior walls of any other material than brick or stone, nor be used or occupied for any other purpose or in any other way than as a dwelling house for a term of twenty years from October 1, 1859. 6. As long as said lot remains unoccupied by a building to be used for a dwelling house as aforesaid, said Smith, his heirs and assigns, shall permit free of charge the proprietor of each adjoining lot, who may build, to erect $\frac{1}{2}$ of the thickness of his division wall on said lots 91-94 $\frac{1}{2}$ inclusive; said Smith, his heirs and assigns shall

pay to said proprietor so erecting said wall a proportional portion of the cost thereof for such part of said wall as he said Smith, his heirs and assigns, may use or occupy, and said Smith, his heirs and assigns, shall, when he erects or they erect a building as aforesaid on said lot numbered as aforesaid, build $\frac{1}{2}$ of the thickness of his or their division wall on each adjoining lot which may be unoccupied by a dwelling house as aforesaid. The buildings now standing on said premises have been erected in conformity with requirements of the foregoing conditions. It being understood that the conditions aforesaid shall apply severally to lots 1, 2, 3, 4, and 5 as shown on Alexander Wadsworth's plan of March 30, 1860, to be recorded. Being a subdivision by said Smith of the aforesaid premises. So that a breach of any of said conditions by the owner or proprietor of any one of said lots in said subdivision shall only render his single estate forfeitable under said conditions, and not render the whole of the aforesaid premises forfeitable for the act of any single violater of said conditions."

The Examiner raises the question whether these provisions constitute restrictions or a series of conditions the breach of any one of which will render the estate liable to forfeiture, and cites *Ayling v. Kramer*, 133 Mass. 12; *Episcopal City Mission v. Appleton*, 117 Mass. 326, and *Clapp v. Wilder*, 176 Mass. 332.

The question is a difficult one both as to the construction of the particular deed here in question, and as to the general principle to be deduced from the cases cited. The case of *Episcopal City Mission v. Appleton* has been cited and quoted in later decisions, but never elucidated or explained. The main proposition that there is no reason for giving one construction to technical language governing one clause, and another construction to the same language governing another clause, and that therefore if one is not a condition neither can the other be, but that both must have a like interpreta-

tion and effect, is plain and simple. There has, however, been much divergence of opinion among conveyancers as to the exact meaning and scope to be given to the language of the Court in the City Mission case, where it says, speaking through Gray, C. J., "both clauses cannot be construed as conditions; because, upon that construction, a breach of the first would, upon entry by the grantor or his heirs, forfeit the whole estate, and leave nothing in the grantee to which the last part of the second clause could apply." It is argued on the one side that this is equivalent to a decision that there can never be, as matter of law, a condition containing more than one cause of forfeiture. It is said that a right of reverter is a dependent estate; that an entry for breach of one condition forfeits the whole estate, and thereby leaves nothing upon which the right to enter for breach of the other clauses can depend; and that therefore the latter clauses can never be conditions. On the other hand it is pointed out that the Episcopal City Mission case can stand on its own facts without any reference to the clause quoted from the decision; that the manifest intention in that case was to regulate user, not to provide for forfeiture; and that it was because an entry for forfeiture would destroy the grantor's whole intent as expressed in the second clause, not because of the bare fact that there was a second clause, that it was held that the provisions could not be construed as conditions.

The whole tendency of the law in modern times has been steadily and systematically opposed to conditions. As pointed out by Mr. Gray, for more than two hundred years the remedy for breach of condition by entry for forfeiture has been obsolete in England. As early as 1808 Sugden in his treatise on Powers declared that "what by the old law was deemed a devise on condition, would now perhaps in almost every case be construed a devise in fee upon trust." Gray, Rule against Perpetuities, Sec. 282.

In this State, provisions in the ordinary form and phrase-

ology of conditions have been freely construed as restrictions until the recent decision in *Clapp v. Wilder*. The authorities are fully collected in that case, especially in the dissenting opinion. See also Crocker's Notes on Common Forms, 4th ed., page 101 *et seq.* I doubt, however, if the cases have gone quite so far as is assumed by Mr. Gray, (Note: and see the 2nd ed. of Gray on Perpetuities, 1906) or that the earlier decisions in *Atty. Gen. v. Merrimack Mfg. Co.*, 14 Gray, 586, and *Guild v. Richards*, 16 Gray, 309, must be taken to have been overruled in the later cases of *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, and *Ayling v. Kramer*, *supra*.

Conditions have always been strictly construed in Massachusetts. *Bradstreet v. Clark*, 21 Pick. 389. *Merrifield v. Cobleigh*, 4 Cush. 178. *Hadley v. Hadley Mfg. Co.*, 4 Gray, 140. *Clapp v. Wilder*, *supra*. Wherever it has seemed reasonably possible to construe a given provision as anything other than a condition, as for instance, an agreement, a covenant, a charge, a trust, or a restriction, courts have, as Mr. Justice Hammond says in *Clapp v. Wilder*, exercised "considerable astuteness" in this direction. *Felch v. Taylor*, 13 Pick., 133. *Wheeler v. Dascomb*, 3 Cush., 285. *Goodrich v. Proctor*, 1 Gray, 567. *Sohier v. Trinity Church*, 109 Mass. 1. *Skinner v. Shepard*, 130 Mass. 180.

Notwithstanding this fact the right to create by apt language an old fashioned common law condition, forfeiture and all, has always in this State been admitted and maintained. The very cases that have most emphasized the necessity for strict construction have clearly pointed to the continued existence in Massachusetts of estates on condition, with their attendant right of reverter for breach. *Hadley v. Hadley Mfg. Co. supra*. *Gray v. Blanchard*, 8 Pick., 283. *Langley v. Chapin*, 134 Mass. 82. *Guild v. Richards*, 16 Gray, 309. *Austin v. Cambridgeport Parish*, 21 Pick., 215.

In the case of *Stanley v. Colt*, 5 Wall. 119, the circum-

stances of the trust estate were such that they constituted the principal ground for the decision of the court, and the provision in question was clearly a trust rather than a condition because of that fact, just as in the Massachusetts case of *Sohier v. Trinity Church*, *supra*.

Whether or not *Clapp v. Wilder* was (as is vigorously urged in the dissenting opinion) contrary to the current of prior decisions, the case in itself went no further than to hold that a common law condition enforceable by forfeiture is still possible in Massachusetts, and the majority opinion in *Clapp v. Wilder* expressly excepted and approved both cases like *Episcopal City Mission v. Appleton* and cases like *Ayling v. Kramer*. Unfortunately the case at bar combines some features of the class of cases like the *City Mission* case with others like *Ayling v. Kramer*, and still others like *Atty. Gen. v. Merrimack Mfg. Co.* The provisions in the case at bar contain the identical clauses construed in *Ayling v. Kramer* to be not conditions, but restrictions; while at the end of them follows an express provision relating to breach and forfeiture.

It seems to me that the true rule was that pointed out by Lord Cairns in *Attorney-General v. Wax Chandlers Co.*, L. R., 6 H. L. Eng. and Irish App. 1, where he suggests that the difficulty in the matter is more apparent than real, and is caused by confounding together two classes of authorities which run on intrinsically separate and distinct lines. In one class of cases the intent of the parties is to create in the devisee or grantee an estate so long, and so long only, as he fulfills the conditions; in the other class it is to create in the grantee or devisee an estate in fee simple absolute, to be held and administered however in a certain manner, not by the grantor or testator or their heirs, but by the grantee and his successors. In the first class it is a condition; in the second class it is a trust, or an equitable restriction. The provision is to be construed in accordance with the object

to be attained, not from the phraseology or form of words employed. The rule is analogous to that employed in the matter of construing exceptions or reservations. The clause is to be construed as an exception or a reservation, not from the technical phrase used, but from the nature of the estate. *Stockwell v. Couillard*, 129 Mass. 231. *Kimball v. Withington*, 141 Mass. 376. *White v. N. Y. & N. E. R. R.*, 156 Mass. 181.

Even a common law condition may operate through the interposition of equity in the manner of an equitable restriction, or by way of trust in favor of the several land owners affected. *Hamlen v. Keith*, 171 Mass. 77. *Hopkins v. Smith*, 162 Mass. 444. *Clapp v. Wilder*, *supra*. *Hook, Petitioner*, Land Court Decisions, page 70, *ante*. (Note: And see *Wilson v. Mass. Inst. of Tech.*, 188 Mass. 565, 581.) Conversely the fact that a provision is enforceable in equity does not per se render it unenforceable as a common law condition. The test is, was the object of the provision in question to preserve a personal right, or to create an appurtenant one?

It seems clear that a grantor not only may, but ought to be able to, provide for an entry for forfeiture on breach of any one of a series of conditions. It is true that having once repossessed himself of the entire estate there is nothing left for the other clauses to act on, but the answer is that in such a case it was not intended that there should be. The object of the grantor was not to perpetuate a manner of holding the property for the benefit of other land, but merely to provide that unless held by its grantees in accordance with his conditions the title should come back to himself as of his former estate.

In the case at bar the deed was one of a series of conveyances made by a municipal corporation in the course of disposing by sale of a large tract of land cut up into house lots. The first five clauses in question have already been

construed as creating not conditions but restrictions. Forfeiture to the City of an unrestricted estate would be inconsistent with everything in the deed except the last clause. The whole object seems to have been to provide for the manner of use of the property by the grantee and his successors, as part of a general scheme of improvement. The subsequent provision for forfeiture is contrary to, rather than consistent with, that purpose. It is repugnant to prior language employed by the grantor, and must be rejected, not, as it seems to me, because an estate cannot be created on condition with several possible causes for breach, but because that clearly does not appear to have been the intent of this particular instrument.

Decree for petitioner subject to restrictions.

ELIZABETH A. JAMES, PETITIONER.

Suffolk, October, 1903.

Mortgage to Executors and Trustees — Assignment — Execution by One, Insufficient — Distinction between Mortgage to Testator and Mortgage to Executors or Trustees.

In this title there occurs a mortgage given to two persons as executors and trustees under the will of one Monks, an assignment thereof by only one of the executors, and a discharge by the assignee.

In two old Massachusetts decisions a distinction is made, as to the right of one executor to assign a mortgage, between a mortgage taken by the testator and a mortgage taken directly by the executors. In the case of a mortgage made to the testator, one of two executors may make a valid assignment. *George v. Baker*, 3 Allen at 326, note. Where however a mortgage is made direct to the executors, one executor cannot assign it. *Smith v. Whiting*, 9 Mass. 334.

Neither case has been cited in any later decision in this State, and the text books differ radically in their opinion as to the law in the matter.

Mr. Crocker cites both cases with approval, and adds some authorities in support of *George v. Baker*. The cases cited by Mr. Crocker merely go to the authority of one executor to give a discharge however. Crocker, *Notes on Common Forms*, p. 182. In *Lomax on Executors* (360), and in *Williams on Executors* (9th Ed. 818), the principle is laid down that one of two executors cannot assign a debt of the testators, because it amounts practically to the assignment of a chose in action, and the co-executor might refuse to

come in, citing the old English case of *Lepard v. Vernon* 2 V & B 54. In *Tiedeman on Commercial Paper* (148) the point is made that the taking of a mortgage by an executor is not within the strict duties of his office, and that therefore the investment may be held to be that of the estate, or it may be held to be that merely of the executors individually. In *Daniels on Negotiable Instruments* (section 266) *Smith v. Whiting* is disapproved of, and it said that the better opinion recognizes no distinction between a mortgage taken by the executors and one given to the testator himself, citing *Bogert v. Hertell* in New York, and *MacKay v. St. Mary's Church* in Rhode Island. In *Jones on Mortgages*, Sec. 796(a), the same doctrine is stated, relying on *Bogert v. Hertell*, but *Smith v. Whiting* is not mentioned.

In the Rhode Island case the matter is disposed of very briefly, and the Court merely follows *Bogert v. Hertell* rather than *Smith v. Whiting*. Moreover the case itself was an action on a promissory note given for a debt due the testator, and so within the distinction made in *Tiedeman*, and readily distinguishable from *Smith v. Whiting*. *MacKay v. St. Mary's Church* 15 R. I. 121.

The case of *Bogert v. Hertell* was very fully considered and three times reported. The facts were like those in the case at bar, with the additional circumstance that in *Bogert v. Hertell* the executor who made the assignment misappropriated the funds thereby obtained. The Vice-Chancellor went into the question very thoroughly, and based his decision that the assignment was invalid upon the ground that in taking the mortgage the executors were not acting within the proper scope of their duties as executors, and must therefore be deemed to have taken it as trustees. On appeal the Chancellor sustained the decision, citing *Smith v. Whiting*. The case then went to the Court of Errors where, by a divided court and with a strong dissenting opinion filed, the decisions below were reversed, and *Smith v. Whiting* was

disapproved. *Hertell v. Van Buren*, 3 Edw. Ch. 20. *Bogert v. Hertell*, 9 Paige, 52. *Bogert v. Hertell*, 4 Hill. 492.

Whatever the law may be elsewhere, in Massachusetts the case of *Smith v. Whiting* has never been overruled, and moreover the decision itself appears to be perfectly sound. The principle involved is not a matter of pleading, it is simply the question whether the note or mortgage was taken by the holders in their capacity as executors and within their duties as such, or in the capacity of trustees, whether trustees de jure or de son tort being immaterial.

There must be service of process in this case on the Monks estate. If the petitioners can show that the mortgage was accounted for in that estate, they may on the ground of equitable estoppel have a decree; but on the record as it stands, the title is not proper for registration.

So ordered.

Note: See *Robbins v. Horgan*, 192 Mass. 443.

ROMAN CATHOLIC ARCHBISHOP OF BOSTON,
PETITIONER.

Suffolk, November, 1903.

Statute of Pious Donations — Devise to Roman Catholic Church.

Title to the property in question in this case comes under the will of one William Kyle, late of Boston, deceased, in which this particular estate was specifically devised, on the death of a life tenant now deceased, "to the parish church." The testator was a Roman Catholic by faith and attached to St. Stephen's parish in the City of Boston. The statute of donations for pious uses in force at the date of the will and of the death of the testator, 1891, provided that the deacons, church wardens or other similar officers of churches, appointed according to the discipline and usages thereof, shall, if citizens of this Commonwealth, be deemed bodies corporate for the purpose of taking and holding in succession all grants of real estate made either to them or their successors, or to their respective churches.

The petitioner claims that the Archbishop of Boston was an officer of the Roman Catholic Church "similar" to the deacons or church wardens of Protestant Churches within the meaning of the statute, for the purpose of taking and preserving grants made for Church purposes. The method of administration, both of temporal and ecclesiastical affairs, in the Roman Catholic Church, differs materially from that of the Protestant bodies so often regulated and discussed in the early statutes and decisions in this State. According to the discipline and usages of the Roman Catholic Church,

there is no parish in the sense in which the term is employed in the Protestant bodies, or in our statutes. *Canadian Asso. v. Parmenter*, 180 Mass. 415.

The property rights in each diocese vest, both under the decrees of the Plenary Council of Baltimore and under the Diocesan Statutes, in the Bishop "in his own name and with the full and absolute title of law known in English as 'fee simple,'" although it is further provided that "while so far as the civil law is concerned, he is vested with the full title of the ecclesiastical property of his diocese, yet by the sacred canons he is not the owner of said property, but merely the administrator of it." Careful provision is further made for the separation and inventory of ecclesiastical property so held, that it may not be diverted from the uses for which it is held.

The diocese of Boston has as its diocesan head, not a Bishop, but an Archbishop, a church official holding the same powers and duties as a Bishop though with a higher ecclesiastical title, therein differing distinctly from the Archbishops known to the Anglican law. The diocesan statutes for this diocese declare "that the administration of church property belongs exclusively to the Archbishop," with certain reservations not material to this case. The parishes are established both territorially and numerically by the Archbishop; title to all parish property stands in his name; the Rector is appointed by him; his salary is both established and paid by him; and all revenues of the church or parish go direct to the Archbishop unless otherwise ordered by him.

In St. Stephen's parish, which is a Roman Catholic parish in usual form, the title to the church itself was conveyed in 1862 from the New North Religious Society to the then Roman Catholic Bishop of Boston, being held in 1891 by the Roman Catholic Archbishop of Boston, and at the present time by the petitioner as successor in title.

Decree for petitioner.

SOUTH FRAMINGHAM COOPERATIVE BANK,
PETITIONER.

Middlesex, December, 1903.

*Deed of Married Woman — Assent by Husband — Release
of Curtesy.*

Title in this case is held under a deed given in 1892 by a married woman. The deed was signed and sealed by both the grantor and her husband, but contained neither a release of curtesy nor an assent by him in any express terms. The only mention made of the husband in the deed occurs in the testimonium clause which recites that "in witness whereof we, the said Elizabeth A. Granfield and William A. Granfield husband of the aforesaid Elizabeth, hereunto set our hands and seals." The Examiner questions the sufficiency of this deed as a bar to the husband's curtesy rights in the land thereby conveyed.

There has taken place at different times a material change in the attitude of conveyancers in regard to the proper execution of a deed of a married woman, caused by the various changes which have been made from time to time in the statutes. Sometimes the matter of importance has been the validity of the deed itself; at other times the question, as a matter of practical conveyancing, has been limited to the sufficiency of the deed as against the husband's curtesy.

At common law the deed of a married woman was absolutely void. Her estate could, however, pass by fine in which the husband joined. By Chapter 21 of the Acts of 1697 of the Province of Massachusetts Bay it was provided that all deeds of any lands within the Province signed and sealed

by the party granting should be valid to pass the same without any other act or ceremony in the law whatever. Whether the right of a married woman in this Commonwealth to convey her lands by deed rests on the common law right to join her husband in a fine supplemented by the Act of 1697, or on immemorial usage, is of little practical importance. Chief Justice Parker after careful consideration was of the opinion that it rests on usage founded in necessity, since a conveyance by fine was unknown to Massachusetts; but in later decisions the Court has been of the other opinion. *Fowler v. Shearer*, 7 Mass. 14. *Thacher v. Omans*, 3 Pick., 521. *Bartlett v. Bartlett*, 4 Allen 440.

When the Revised Statutes were compiled in 1836 there was added to the essential language of the Act of 1697 an express provision, merely declaratory, however, of the law as already fixed by judicial decision as above stated, that "a husband and wife may, by their joint deed, convey the real estate of the wife, in like manner as she might do by her separate deed, if she were unmarried." Revised Statutes, Chap. 59, Sec. 2. Provision was also made for the conveyance of the estate of a married woman where her husband was a minor, or in prison, or had abandoned her, or where she had come from another State without him. Acts of 1787, Chapter 32. Acts of 1823, Chapter 146. Revised Statutes, Chapter 77.

In 1845 provision was made for the acquirement by a married woman of property to be held to her sole and separate use, and such property she was authorized to convey by her sole deed, subject, however, to her husband's tenancy by the curtesy. Acts of 1845, Chap. 208.

These provisions for the acquirement of a separate estate by a married woman were greatly enlarged by the statute of 1855 as to any woman who should be thereafter married in the Commonwealth, and it was provided that any such woman might convey her real property in the same manner

as if sole, except that no conveyance of real property should be valid without the assent in writing of her husband, or the consent of a Judge of the Supreme, Common Pleas, or Probate Court, duly obtained. Acts of 1855, Chap. 304.

In 1857 the separate estate of a married woman was again enlarged, and it was provided that no conveyance should be valid without the assent in writing of her husband or the consent of a judge, in which last case, however, the estate by curtesy of her husband should not be impaired or conveyed. Acts of 1857, Chap. 249.

In the revision of 1860 provision was made for the conveyance of real estate of a married woman which was not her separate property, by a joint deed with her husband, in like manner as she might do by her separate deed if she were unmarried; and, as to real estate which was her separate property, by deed as if she were sole, except that such deed should not be valid without the assent of her husband in writing, or his joining in the conveyance, or the consent of a judge after proper proceedings, and not effective to impair the husband's rights as tenant by the curtesy without his written consent. G. S., Chap. 108, Sec. 2, 3, 10.

In 1874 a married woman was authorized to convey all of her real property as if she were sole, her separate conveyance, however, to be subject to her husband's contingent interest therein. Acts of 1874, Chap. 184.

When the Public Statutes were compiled in 1882 these provisions were materially changed in language, the new statute providing that a married woman may dispose of real property in the same manner as if she were sole, except that she shall not without the written consent of her husband destroy or impair his tenancy by the curtesy. P. S. Chap. 147, Sec. 1. In 1889 this act was amended by adding to tenancy by the curtesy the statutory life estate of a husband. Acts of 1889, Chap. 204.

In 1902 another material change was made, and the pro-

vision now reads that a married woman may dispose of her real property in the same manner as if she were sole, except that no conveyance other than one made under a decree of court shall impair the husband's tenancy by the curtesy, statutory or otherwise, unless he joins in the conveyance or otherwise releases his rights. R. L. Chap. 153, Sec. 1.

Considering the many and marked changes that have taken place in the statutes, and the decided variance among conveyancers both as to their intent and their effect, there are surprisingly few cases on the subject.

Prior to 1845 a joint deed, in which both husband and wife were made parties to the effective and operative part of the grant, was necessary both to the release of curtesy and to the validity of the deed itself. *Catlin v. Ware*, 9 Mass. 218. *Lithgow v. Kavenagh*, 9 Mass. 161, 173. *Jewett v. Davis*, 10 Allen, 68.

From 1845 to 1857 (except as next hereinafter noted), a married woman could convey her separate property without her husband joining in the deed, subject, however, to his curtesy. A release of curtesy, either specific or by general grant, was therefore necessary to bar his interest. *Beal v. Warren*, 2 Gray, 447. *Comer v. Chamberlain*, 6 Allen 166.

From the 1855 statute to that of 1857, a woman married within that period could convey real estate in the same manner as if sole, except that the deed was not valid without the written assent of her husband or the consent of a judge. Here clearly the consent necessary to validity was likewise sufficient to bar curtesy, the consent of the judge being equally efficacious with that of the husband. As to the separate property of women married before that time, a release of curtesy was necessary, and as to real estate not their separate property, a joint deed. *Jewett v. Davis*, 10 Allen, 68. *Bent v. Rogers*, 137 Mass. 192.

Mr. Crocker seems to have misapprehended the Court's interpretation of the granting clause in *Bent v. Rogers*.

The deed was the deed of several grantors. Sarah G. Bent was the wife of Albert A. Bent. The clause in question read "I Albert A. Bent, in the right of his wife, Sarah G. Bent, John K. Pike," and so on. The Court construed the clause as including Sarah G. as a grantor. Mr. Crocker leaves out the comma after the word "wife," and reads the whole clause "in the right of his wife Sarah G. Bent," as being merely descriptive of Albert's capacity as grantor. Crocker, *Notes on Common Forms*, p. 245.

From 1860 to 1874 the real estate of a married woman not her separate property still required a joint deed. Neither assent nor a signature limited to anything less than a joinder in the full grant was sufficient. If the assent was sufficient however, of course curtesy was of necessity covered in the grant of the entire estate. *Concord Bank v. Bellis*, 10 Cush. 276. *Bruce v. Wood*, 1 Met. 542. *Lowell v. Daniels*, 2 Gray 161. *Perkins v. Richardson*, 11 Allen 538. *Leggate v. Clark*, 111 Mass. 308. As to real estate which was her separate property, assent of the husband was necessary both to its validity and to bar his curtesy, and the assent was sufficient for both purposes. It had to be an assent in writing, and made as a part of the transaction, but it need be nothing more than an assent. It was in no sense the conveyance of an estate, or even a release; it could be put in whatever form might be desired, even that of an attesting witness, so long as it filled the single statutory requirement of a written assent. *Basford v. Pearson*, 7 Allen 504. *Hills v. Bearse*, 9 Allen 403. *Townsley v. Chapin*, 12 Allen 476. *Staples v. Brown*, 13 Allen 64. *Melley v. Casey*, 99 Mass. 241. *Cormerais v. Wesselhoeft*, 114 Mass. 550. *Child v. Sampson*, 117 Mass. 62. Without such assent, though the wife's deed might be validated by the consent of a judge, curtesy would not, after the act of 1857, be barred. *Lynde v. McGregor*, 13 Allen, 182.

I think that Mr. Crocker misapprehended this last case also. He construes the statute as above stated, but at first assumes, and then later merely suggests, that *Staples v. Brown and Lynde v. McGregor* are contra. Crocker, Notes on Gen. Stat. p. 290. Crocker, Notes on R. L. p. 505. The husband's right of curtesy under these statutes in his wife's separate estate was regarded as an inchoate possibility only, which, like dower, could be barred by apt language, but could not be separately conveyed nor seized by creditors, though unlike dower it could be barred by estoppel. *Walsh v. Young*, 110 Mass. 396. *Silsby v. Bullock*, 10 Allen 94. *Hayden v. Pierce*, 165 Mass. 359.

From 1874 to 1882 it seems clear that a release of curtesy was again necessary. The wife might convey as if sole, but her "separate conveyance" was "subject to her husband's contingent interest therein." There seem to be no cases on this point, but the opinion and practice of conveyancers was in accordance with what seems to be the clear intent of the statute.

In 1882 the language of the statute reverted partly to the Act of 1855 and partly to the law of 1860, and a married woman was permitted to dispose of all of her real estate "in the same manner as if she were sole," except that she could not "without the written consent of her husband" impair his curtesy. It seems clear that written consent in this statute is to be construed as before. No assent is necessary to the validity of the deed. The husband's signature and seal in witness of his wife's conveyance in fee in like manner as if she were sole, (free from all marital rights) is not only meaningless and worthless but misleading, unless it is an assent to bar his curtesy, the only way in which the deed which he solemnly joins in can take effect as written. *Pacific Nat. Bank v. Windham*, 133 Mass. 175, 178. I think that from 1882 to 1902, as from 1860 to 1874, written assent bars curtesy. This covers the case at bar. In passing it

may be noted that special provision was made in the Public Statutes that women conveying under decree of court should convey as if unmarried, thereby barring curtesy.

Since 1902, joinder by the husband in the grant, or a specific release of curtesy, except in deeds made under decree of court, seems once more to have become necessary.

Decree for petitioner.

SEARS ET AL., TRUSTEES, v. WALWORTH MFG.
CO. ET AL.

Suffolk, December, 1903.

Flats — Division of Flats on a Headland or Curving Shore
— Angle of Side Lines — General Scheme.

The petitioners in this case claim as appurtenant to their upland a parcel of flats the side boundary lines of which they claim are lines drawn at right angles to the base line of the shore frontage of their upland. The respondents deny the correctness of the petitioners' claim, but differ among themselves as to the true rule for the division of flats on a headland, while the trustees of the New England Trust assert that the matter has been settled by a general scheme adopted by all of the owners of flats along this portion of the shore.

On the general proposition as to the proper division of flats on a headland, it has been argued, and we have been given an opinion to the same effect by an expert engineer familiar with this locality, that the correct method of division is the method adopted in Maine in the case of *Emerson v. Taylor*, 9 Greenl. 42, as reported in the note to *Gray v. Deluce*, 5 Cush, at page 13, which is, to determine the side lines in the case of each individual lot by drawing a base line between the two corners of the lot at the upland, and running from each corner a line at right angles thereto. The perpendicular lines thus obtained running from the intersection of each lot, will in every case diverge by an angle commensurate with the curve of the headland; and the boundary line between the adjacent lots is in such cases deter-

mined by bisecting the angle thus formed. This method, however, must necessarily vary the general direction of the lot lines with each sub-division or change of ownership; and as the side lines of the adjoining owner cannot be affected, the result must, in every case where the headland runs on a marked curve, result not only in a very uneven division of the flats in proportion to the high water line of the upland, but in many cases in the adoption of converging lines instead of the diverging lines called for by the policy of the law. *Porter v. Sullivan*, 7 Gray, 441. Where the shore line is strongly indented, and especially if the side lines be drawn, as is most usual and natural, from the center of a small headland and the center of a small cove so that each owner has a fair proportion of both headland and cove, the injustice, and in some instances impossibility, of the rule proposed is very marked.

It is undoubtedly true that in an attempt to settle the side lines of a single parcel of flats, in an occasional case, and in private practice, it may be impracticable for an engineer to attempt any general method. But in proceedings in this Court, no such difficulty arises. Land registration itself is an administrative measure adopted by the Commonwealth as a matter of public policy for the better settlement upon an enduring basis of property lines, as well as for a simpler and more economical method of preserving public records. The Court can, and if necessary will, order surveys which might be beyond the powers or needs of a single interested party; and must further select such methods as will not cause a conflict in future cases involving adjacent properties. I am still of opinion, as stated in the decision in *Bradstreet, Petitioner*, Land Court Decisions, p. 34 *ante*, that the proper method of division of flats on a headland, in the absence of lines otherwise fixed by the parties, is by radii from the general average curve of the headland. This fixes in each and every case a line entirely consistent with all

prior and subsequent division lines, and which preserves for each lot a property line at low water mark reasonably proportionate to that at high water.

It is argued, however, that whatever the ordinary rule of division may be, it must be controlled in this case by the acts of the parties, the practical interpretation as to the matter of side lines apparent throughout the course of the common title as well as in the course of the titles to adjoining properties, the general plan of construction of streets and wharves adopted by the town and city authorities and the community at large in this part of the city, and the plan of the State authorities in the erection of wharves and similar structures, and the reclaiming of the flats in this part of the harbor.

While it is true that the plan of development adopted by a single adjoining owner as to his property can have no effect (*Boston v. Richardson*, 13 Allen 146, at 162), yet a valid agreement as to side lines may be inferred from the pursuance of a general scheme in the neighborhood. In *Atty. Gen. v. Boston Wharf Co.*, 12 Gray 553, 559, the mere fact of one side line being fixed by the centre of the street protracted to low water, seems to have been deemed almost enough in itself to create a presumption that the side lines of the flats are to run parallel therewith. In the case at bar all of the facts are present as to the action of the town authorities in regard to the laying out of the streets, of the building of wharves and other structures in the neighborhood parallel therewith, and all the other circumstances from which a general scheme of development, and an agreement therefor, were presumed in *Henshaw v. Hunting*, 1 Gray 203, and *Adams v. Boston Wharf Co.*, 10 Gray 521, and further, we have in evidence in this case the whole general scheme of development of the flats under the direction of the Land and Harbor Commissioners of the Commonwealth. *Winnissimmett Co. v. Wyman*, 11 Allen 432, has been cited as authority for the proposition that it is not

a general scheme, but merely the particular circumstances of each individual lot, which is to be considered in such cases. But the Winmissimmett decision seems to me to be merely another authority to the point last cited, the general rule being there disregarded because of a contrary agreement being inferred from the acts of the parties in the erection of their wharf and other indications of their intention to build out on a continuation of their property lines at the upland.

The general rules adopted for the division of flats are mere rules of construction under the ordinance of 1647, and it has been repeatedly declared that the object of that ordinance was the better protection and development of wharves and flats for the benefit of the community through the equitable distribution between the owners of the upland properties of what, prior to that ordinance, were property rights in the public at large. *Henry v. Newburyport*, 149 Mass. 582. In the case at bar the adoption of radial lines from the upland, or any lines other than those running parallel to the streets, would be contrary to the whole general scheme of development adopted by public authorities, and would result in an exceedingly unequal division of the flats among the owners on this particular headland, closing off two of them entirely from access to deep water, and giving to two others an amount of low water line and flats wholly disproportionate to their ownership of the upland. It is true that this is to a considerable extent the effect of the line adopted in *Gray v. Deluce* immediately to the west of the property now in question, but in *Gray v. Deluce* the line of general division was followed in the absence of anything to control it. The Court did not have before it the facts and data present in this case. *Adams v. Boston Wharf Co.*, 10 Gray 521. Moreover it appears from an examination of the original papers and of the record title to the property there under consideration, that the "agreed facts" on which *Gray*

v. Deluce was submitted to the Court were not the facts as they actually existed.

Decree for petitioner, boundary lines over the flats to run parallel to P st.

D. A. Dorr, C. H. Swan for petitioners.

Carver & Blodgett, J. J. Myers, A. H. Brooks, J. Duff, J. F. Sullivan for respondents.

DELIA A. BOWERS *v.* ELIZABETH A. SELEW.

Middlesex, February, 1904.

Deed — Boundary on Way — Exclusion of Fee in Way.

Title in this case is claimed under a deed in which the description reads, "Beginning at the southeast corner of the premises on the south side of Worcester Street at land of Daniel Wight; thence running westerly on said street about 26 rods to a leading way; thence northerly on said leading way as the fence now stands about 63 rods to land of Eleazer G. Wight." The examiner reports that the petitioner has title to the center of Worcester Street, but to the line only of the old leading way, and without any rights in the latter. This is also the contention of the respondent.

The whole policy of the law in this Commonwealth with regard to boundaries on streets and ways has undergone a marked change and development since the early cases on the subject, in the course of which some confusion and apparent conflict in decisions has been inevitable.

At first it seems to have been assumed that it was the ordinary intent of the parties to convey to the side line only of a street or way, and this was the rule of construction in the early cases. *Tyler v. Hammond*, 11 Pick. 193. *O'Linda v. Lothrop*, 21 Pick. 292. *Morgan v. Moore*, 3 Gray 319.

As the country developed, however, and towns and cities grew, the use of streets and ways greatly increased, and the change in character, as well as the nature and effect, of the ownership in the fee of a street or way became more clear. The policy of the law steadily developed in favor of a construction which would carry a fee in that portion of a street

adjoining any granted premises into the owner of the tract so granted, and against a construction that would leave a bare, naked and meaningless title outstanding in one to whom it could be of but little if any use, and oftentimes greatly to the prejudice of the grantee. In aid of this construction the rule was laid down by Judge Gray that a road being a monument which has width, the center thereof shall be the boundary. *Boston v. Richardson*, 13 Allen 146. *Gould v. Eastern Railroad*, 142 Mass. 85.

Later came the rule laid down by Judge Holmes that the whole matter is purely one of the intention of the parties in each particular case, the presumption being, not a fixed rule of law like the Rule in *Shelley's Case*, but merely a rule of construction adopted in the absence of any better evidence as the best means of determining the intention of the parties. *Crocker v. Cotting*, 166 Mass. 183.

So far as the boundary on Worcester Street is concerned, the grant, in accordance with modern presumption, clearly carried to the middle of the street. The older decisions like *Tyler v. Hammond*, and *O'Linda v. Lothrop* must be deemed to be overruled. *Newhall v. Ireson*, 8 Cush. 595. *Phillips v. Bowers*, 7 Gray 21. *Boston v. Richardson*, 13 Allen 146, 152. *Crocker v. Cotting*, 166 Mass. 183. And see *McKenzie v. Gleason* just published, 184 Mass. 452, 457.

Nor will the mere use of distances which stop at the side of the way be sufficient to exclude the fee in the way to the middle line thereof. *Newhall v. Ireson*, 8 Cush. 595. *Clark v. Parker*, 106 Mass. 554. *Dean v. Lowell*, 135 Mass. 55.

It is said that the law is otherwise, however, where measurements are governed by a monument standing on the side of the way, and that this distinction explains the apparent contradiction between the cases cited above and those in which the fee has been held to be controlled by the monuments, and therefore limited to the side of the way. *Sibley v. Holden*, 10 Pick. 249. *Phillips v. Bowers*, 7 Gray 21.

Peck v. Denniston, 121 Mass. 17. *Chadwick v. Davis*, 143 Mass. 7. *Sibley v. Holden* is said by the editor of the second edition of Pickering's reports to be equally with *Tyler v. Hammond* "in a measure opposed to the current of authorities." This is unquestionably true as to *Tyler v. Hammond*. See the cases noted above and also *Paine v. Woods*, 108 Mass. 160, 171. Both *Sibley v. Holden* and *Phillips v. Bowers* seem also to be contrary to the principle of the more recent decisions. They are repeatedly cited with approval, however, and are apparently distinguished on the ground that the presence of the monument on the side of the way shows an "obvious intent" by the parties to exclude the way. In *Peck v. Denniston* the point is squarely made that in *Sibley v. Holden* by the fact that the boundary begins at a monument "on the side of the road, the side of the road is thus fixed as a line from which the boundary should begin, and along which it should run." In *Chadwick v. Davis*, where the boundary began at a stake and stones on the county road, thence around the various sides to said county road and thence bounding "on said county road" to the first point, it was held that title would carry to the center of the road under the ordinary presumption, unless it appeared as a matter of fact that the stake and stones were upon the side of the road, in which case the fee in the road would be excluded.

A rule more consistent with the trend of the modern authorities, and suggested by some of the more recent cases, is that "it is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way," using the natural and really only available monuments substantially as a surveyor uses his base line, not as a boundary line, but as a means supplied from the natural monuments from which the boundary line may be ascertained and determined. *Dean v. Lowell*, 135 Mass. 55. *Dodd v. Witt*, 139 Mass. 63.

Mr. Crocker clung to the old rule that "if a monument standing at the side of the way is mentioned as a point to and from which the boundary lines of the premises run, the whole of the fee is excluded," citing, however, a number of the later decisions as being "contra." He also strongly disapproved of *Crocker v. Cotting*. Crocker, Notes on Common Forms, Pages 46 and 47.

It would seem that there is no good reason why, in the natural course of development, cases like *Sibley v. Holden* and *Phillips v. Bowers* should not also fall by the wayside like *Tyler v. Hammond*, and title be carried to the center of the way unless barred by something stronger than the mere fact that a fixed monument on the side of the way was adopted for the purpose of measurement. So far, however, the cases have not gone to that extent. But where a deed expressly bounds by the line of the street, there seems to be no doubt that the fee in the street is excluded. *Smith v. Slocomb*, 9 Gray 36. *Holmes v. Turners Falls Co.*, 142 Mass. 590. *McKenzie v. Gleason*, 184 Mass. 452.

In the case at bar, the boundary is expressly run "as the fence now stands," and that was by the side of the road. The accompanying words "on the road," as in the case of *McKenzie v. Gleason*, seem to be "obviously used for the purpose of description only," and the deed cannot fairly be held to import a grant of anything beyond the boundary named. The examiner's report is confirmed, and registration must be by the line of the fence on the side of the old leading way, and without any appurtenant rights in the way.

So ordered.

CHARLES P. COFFIN, PETITIONER.

Essex, February, 1904.

Devise — Remainder — Possibility of Issue Extinct.

This case raises the question of possibility of issue extinct. By the will of Micajah C. Pratt locus was left to the testator's daughter, Adeline, during her natural life, and after her death to her issue, if she should have any, during the life of said issue, with remainder in fee to another daughter, Ann, under whom the petitioner claims. The daughter Adeline is still living and is 82 years of age. She has been twice married; has had issue, none of whom are now living; and her second husband has been dead for many years. The petitioner asks for registration of title subject to the life estate of Adeline only.

Mr. Lawson in his recent book on Presumptive Evidence (p. 364) states that there is no case in America which upholds the doctrine of a presumption of the possibility of issue extinct; and there are but few American cases on the subject at all.

In England some of the early cases were opposed to any such doctrine, and in 1864, Vice-Chancellor Wood enunciated a rule that there could be no such presumption, even in an extreme case, as to a woman under 50 years of age. In the case before him the woman was 49 years of age, had had no children for 20 years, and there was medical testimony as to absolute impossibility of further issue. *Groves v. Groves*, 9 L. T., n. s., 533. In 1874, however, Vice-Chancellor Mailins held directly to the contrary in the case of a woman who was aged but 47. *Re Summers Trusts*, 30 L. T.,

n. s., 377. The later English cases have uniformly held in support of the presumption. *Edwards v. Tuck*, 23 Beav. 268. In *re Millner's Estate*, L. R., 14 Eq. Cas. 245. In *re Widdow's Trust*, L. R., 11 Eq. Cas. 408. Other cases are quoted in the Reporter's note to *Edwards v. Tuck*, together with the ages of women in regard to whom the presumption was raised in each case. It would seem, however, that, as stated by the American courts, there is no certain or safe rule as to age, and it would appear from the general trend of the English cases that it is essentially a matter of probability on the particular facts of each case. Thus the presumption was refused in the case of a woman aged 54 years who had children but had only been married for three years, *Coxton v. May*, L. R., 9 Ch. D. 388, while it was upheld in the case of a spinster of the same age. *Davidson v. Kimpton*, L. R. 18 Ch. D. 213.

In the United States on the contrary there seem to be no cases which uphold the presumption, while there are a few which oppose it.

In a Pennsylvania case the court said that nature has fixed no certain age at which the possibility of issue is extinct, and after quoting Blackstone to the effect that the possibility of issue is always supposed to exist in law even though donees be each of them an hundred years old (2 Bl. Com. 125), and Littleton, that the law seeth no impossibility of having children (Co. Lit. 28a), adds that this rule has received the sanction of the ages; but the English cases to the contrary seem to have escaped the court's attention. *List v. Rodney*, 83 Pa. 483.

In a case in the United States Circuit Court in Ohio, in 1895, an estate had been left by will to E for life, with remainder to the issue of her body surviving. At the date of the will E was 50 years of age and unmarried. She left no legitimate issue and the property was claimed by an illegitimate child, his claim being based upon the argument that

the testator must have referred to him and not to legitimate issue, because of the impossibility of legitimate issue on the part of E because of her age at the date of the will. The court, in denying the claim, quote Blackstone and Littleton, a very early English case (*Jee v. Audley*, 1 Cox. Eq. 324), and Lawson on Presumptive Evidence. *Flora v. Anderson*, 67 Fed. Rep. 182.

In Massachusetts the question arose in a case in which there was a bequest in trust for a daughter of the testator during the life of her mother, with remainder, if the daughter should die without leaving issue, to the trustee. The mother having died, and the daughter being nearly 54 years of age and unmarried, the property was claimed by the remainder man. The court deny the claim, saying that, "We are not prepared to say that this fund should now be liberated, although we are aware that under similar circumstances this has been done by the English court of equity." *Towle v. Delano*, 144 Mass. 95. In another Massachusetts case there was a devise in trust for the testator's daughter for life, upon her death to her children for life, and upon their death to the heirs-at-law of such children. The question raised was as to the rule against perpetuities, and the court held that, while it was not probable that the testator's daughter would have after-born children, it was possible, and the question of remoteness must be determined with regard to possible events and not to those which actually or may probably occur. *Lovering v. Lovering*, 129 Mass. 97.

In a New Jersey case, where there was a petition for a sale under the New Jersey statute providing for the sale of estates subject to contingent remainders, the petition was resisted on the ground that there was no contingent remainder owing to the presumption of possibility of issue extinct; but the court while citing the English cases as "asserting a natural presumption," adds that it is not sufficient to take

the case out of the New Jersey statute. Apgar's case, 37 N. J. Eq. 501.

Flora v. Anderson, Apgar's Case and Lovering v. Lovering involve separate principles and are clearly to be distinguished from the case at bar. List v. Rodney rests on the strict rule of the common law, while in Towle v. Delano the court has gone no farther than to say that under the circumstances of that case the fund should not be liberated. In all of the cases, however, it seems to me that a distinction can fairly be drawn which has been made by this court in regard to other questions, namely: that while the court will be very slow to adopt a presumption which would cut off a once actually existing right, the same reasoning will not apply to the registration of an actual title against which there is outstanding, not an actual claim or estate, but a mere improbable possibility. Wilson, Petitioner, Land Court Decisions, p. 20 *ante*. Taft v. Decker, 182 Mass. 106.

In the present case the petitioner has the fee subject to a life estate which he recognizes, and beyond that there is outstanding against him no estate or claim actually existing either in the present or in the past, but merely a remote and extremely improbable possibility (even if it be conceded in accordance with the ancient text books and decisions that it is a possibility) that there may yet be children born to an unmarried woman over 82 years of age.

On these facts there must be a decree for the petitioner.
So ordered.

WACHUSETT NATIONAL BANK, PETITIONER

Worcester, May, 1904.

Land Registration Act — Word “land” — Fees Payable by Petitioner Based on Assessed Valuation of Both Land and Buildings.

In this case the petitioner contends that under Sections 93 and 109 of R. L., Chapter 128, there need be paid to the Recorder one-tenth of one per cent. of the assessed value of the land alone, exclusive of the value of the buildings. The Attorney-General, representing the Treasurer of the Commonwealth in the matter, contends that the “assessed value of the land on the basis of the last assessment for municipal taxation,” means the assessed value of the land together with the buildings thereon.

It is urged by the petitioner that the “basis of the last assessment for municipal taxation” includes the method and manner of assessment as well as the amount; that for the purposes of such assessment the land and buildings are assessed separately; and that such separate assessment and valuation is expressly recognized both under R. L., Chapter 12, Section 58, providing that such separate valuation shall be made by the Assessors, and also under the form of petition provided for in R. L., Chapter 128, Section 20. It is further to be noted that the language of R. L., Chapter 128, Section 93, above quoted, “one-tenth of one per cent. of the assessed value of the land,” is a change made under the Revised Laws from the language of the corresponding Section 94 of Chapter 562 of the Act of 1898 (the original

Land Registration Act) which read, "one-tenth of one per cent. of the assessed value of the real estate."

On page vii of the Report of the Commissioners for Consolidating the Public Statutes, however, the Commissioners expressly state that "changes of language have been necessary in combining different statutes upon the same subject, but great care has been taken not to change the meaning. We have also sought to avoid the use of such words in a series as might or might not be synonymous, such for instance, as 'land,' 'real estate,' 'said premises,' in which case, if the context admitted, the word 'land' has been used uniformly." It is also provided by R. L., Chapter 8, Section 5, Clause 8, that in construing statutes the words "land," "lands," and "real estate" shall include, unless a contrary intention clearly appears, lands, tenements and hereditaments and all rights thereto and interests therein. In no place, other than in the use of the words "real estate" in Section 94 of the original act, and in the form of petition above noted, is there any suggestion of anything other than "land" as the subject matter of the jurisdiction of this Court. The petition is a petition for the registration of title to the land. The decree is a decree in rem as to the title to the land. All of the provisions of the Land Registration Act apply to the land and necessarily include any building that may be thereon.

The object of the requirement that the petitioner should set forth the assessed valuation both of his land and his buildings would seem to be rather a provision intended to secure without question the entire valuation of the subject matter of the proceedings, having in mind the fact that the Assessor's books make a distinction between land and buildings for their purposes, not existing, however, in the purposes or provisions of the Land Registration Act, which otherwise might lead a petitioner in good faith to make a return of a portion only of the valuation upon which it

was intended that the fees under the Land Registration Act should be based, than, as contended by the petitioner, to adopt the distinction made by the Assessors solely for their own purposes, and to incorporate it as an exception to the rule of construction as to the meaning of the word "land" otherwise adopted throughout the Revised Laws. *Hamilton Mfg. Co. v. Lowell*, 185 Mass. 114, 117.

It was further suggested by the petitioner that there would seem to be no good reason why the expense of examination of title of a lot of land with buildings should be any more than without buildings. It very frequently happens, however, that the principal questions involved on a petition for registration of land are questions raised because of the existence of the buildings, and that the examination of title is thereby made much longer and more intricate than would be the case were there no buildings on the property, as, for example, questions of restrictions, conditions, party wall agreements, arched passageways, and the like, several such cases being pending at the present time.

On the whole we are of the opinion that no change was made in the law by the change of language in Section 93 of Chapter 128 of the Revised Laws from that of Section 94 of Chapter 562 of the Acts of 1898; that the word "land" in Section 93 of the present Act must be taken to be synonymous with the words "real estate" in Section 94 of the original Act, and that in both Section 93 and Section 109 of the present Act the assessment of the buildings must be included with that of the land for the purpose of collecting fees.

So ordered.

Baker & Hall for petitioners.

R. G. Dodge, Asst. Atty. Gen. for respondents.

WILLARD PUTNAM, TRUSTEE, v. MARIA F. HILL.

Middlesex, June, 1904.

*Easement — Implied in Law — Distinction Between Grant
and Reservation.*

In 1885 one Lake, then the owner of a tract of land which comprised the present estates of both the petitioner and the respondent, conveyed the respondent's lot to her, with the building thereon, by a deed which called for a frontage on the street of thirty-five feet from the land of one Spring, who was the adjoining owner on the west. The land remaining in Lake is now owned by the petitioner. The boundary line between the respondent and the petitioner was never defined on the ground, delineated on a plan, or its exact location in any way asserted by either party, until by a survey made in 1902 the boundaries of the Spring land were determined. It then appeared that the eaves of the respondent's house, which still remain as they were originally built, overhung the petitioner's boundary line by six inches, and the respondent claims the right to have them so continue.

On this question no Massachusetts case has been cited that is directly in point. On the general subject of the acquirement of easements by implied grant and by implied reservation there has been a good deal of conflict of decisions and of dicta both in England and in this country. The confusion seems to have arisen from a failure to observe the distinction, as to an easement implied by law, between a grant and a reservation. The whole subject is very fully discussed in Jones on Easements, Sections 126 to 136.

In England, after full consideration and some conflict of

authorities, the distinction has been clearly drawn and the law settled. *Suffield v. Brown*, 4 DeG. J. & S. 185. *Wheeldon v. Burroughs*, L. R. 12 Ch. Div. 31. *Russell v. Watts*, L. R. 25 Ch. Div. 559.

And so in some of the American cases. "As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement more readily in favor of a grantee than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases. Some learned Judges in considering what may be termed an implied grant as distinguished from an implied reservation, without however mentioning the distinction, have used language apparently applicable to all easements existing by implication." *Wells v. Garbutt*, 132 N. Y. 430.

In Massachusetts an easement will not be implied by way of reservation unless it be of a right that is actually necessary to the grantor's remaining estate. The deed is to be construed most strongly against the grantor, and unless the case be one of actual necessity, and even then one which the grantor cannot supply for himself at reasonable expense, no easement will be implied in his favor by reservation. *Johnson v. Jordan*, 2 Met. 234. *Buss v. Dyer*, 125 Mass. 287. (Note, and see *O'Brien v. Murphy*, 189 Mass. 353, 355.)

As to a grant, however, the same rule of construction should work substantially the opposite result. As the grant is to be construed most strongly against the grantor, there should pass by way of implied grant whatever is either necessary to the beneficial enjoyment of the land granted, or is obviously used in connection with it, if in the power of the grantor to convey.

A case directly in point is the Pennsylvania case of *Grace Church v. Dobbins*. The facts are substantially identical with those in the case at bar, and the Court lays down the

proposition that "where an owner of land subjects part of it to an open, visible, permanent and continuous service or easement in favor of another part, and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be," and adds that "this is the general rule founded on the principle that a man shall not derogate from his own grant." Unfortunately, however, the Court not only failed to distinguish between a grant and a reservation; but went on to say that most of the cases in Pennsylvania are cases of implied reservation; in which "the rule has been uniformly held as above stated. Its enforcement would be a *fortiori* where the vendee purchases the dominant estate." While both the precedents cited and much of the dicta are contrary to the Massachusetts cases, the decision itself, as well as the principal contention on which it rests, seems to be perfectly sound. *Grace Church v. Dobbins*, 153 Pa. St. 294.

The whole matter, like every question of the kind, rests on the intention of the parties. The petitioner argues that the overhang of six inches in the eaves cannot be deemed to be really necessary to the respondent's estate. But in the case of a grant, unlike that of a reservation, the implication of intent is not limited by necessity. "An implied grant of an easement is not to be extended by construction beyond what was necessary or what is fairly shown to have been within the intention of the creator of it." *Baker v. Willard*, 171 Mass. 220.

In the case at bar the grant was of a lot of land with the buildings thereon, standing as now, complete and obvious, and with eaves projecting as at present. There was no mistake mutual or otherwise, as to the distance of the boundary line from the house. It was simply allowed to remain undetermined. The right to maintain the house as it existed at the date of the grant must be deemed to have passed to the respondent under her deed. *Johnson v. Jordan*, 2 Met. 234.

Thayer *v.* Payne, 2 Cush. 327. Keats *v.* Hugo, 115 Mass.
204. Case *v.* Minot, 158 Mass. 577.

Decree accordingly.

G. A. A. Pevey for petitioner.

Nay & Abbott for respondent.

FREDERICK KEM, PETITIONER.

Suffolk, June, 1904.

Bankruptcy — Assertion of Title by Trustee — Special Statute of Limitations — Election Not to Assume Title.

Title to locus in this case was vested in one Edward W. Dodge at the date of his adjudication in bankruptcy (January 22, 1900), subject to two mortgages. The property was not at that time — nor is it now — worth the amount of the mortgage indebtedness, and the equity of redemption was not included by the bankrupt in his schedule of assets, nor did it in any way appear in the accounts of his trustee. The bankruptcy case was closed, the bankrupt discharged, and the referee's final report filed in October, 1900.

April 1, 1901, the first mortgage was assigned to two maiden ladies, who, instead of foreclosing it, procured a release from the mortgagor and late bankrupt, October 8, 1903, and on November 30, 1903, paid off the second mortgage, which was duly discharged in the margin.

Under the composition acts, both in the Massachusetts insolvent laws and in the present and former bankruptcy statutes, it was expressly provided that upon confirmation of the composition title should revert in the debtor to all property of which he had been by law divested. Regardless of the composition sections of the statute, the title of an assignee is always the title of a trustee, and after his trust in favor of the creditors is accomplished he holds any remaining estate in trust for the debtor. Where the trust in favor of the creditors has determined, and only a bare, legal title remains on a dry trust for the debtor, a re-conveyance may,

where time and circumstances warrant, be presumed. *Greenough v. Welles*, 10 Cush. 571.

The obvious difficulty is that where the trust for creditors has terminated and the indebtedness has not been discharged, title to the property still remains in the assignee.

As against this title, the special statute of limitations is urged. U. S. Bankruptcy Act, Section 11.

The special statute of limitations does not avail as against a vested title. It has to do solely with the assertion of a claim. It does not bear, except indirectly, upon title, estoppel or abandonment. Its purpose is solely to limit litigation in bankruptcy. It may result in the quieting of a title, but that is an incidental, not an essential, matter. Where title, or lawful possession, is in another, and what passes to the trustee is merely a right which must be asserted, delay beyond the statutory period will bar the trustee and all claiming under him. Conversely, where title or possession is in the trustee, the statute will operate against any rights or claims adverse to him. *Bailey v. Glover*, 21 Wall, 342. *Dushane v. Beall*, 161 U. S. 513. *French v. Merrill*, 132 Mass. 525. *Ross v. Wilcox*, 134 Mass. 21. *Kenyon v. Risley*, 147 Mass. 476. *Rock v. Dennett*, 155 Mass. 500. (Note: and see *Whittredge v. Sweetser*, 189 Mass. 45.)

The speedy closing up of a bankrupt estate is, however, one of the principal objects of the present bankruptcy act, and the special statute of limitations is only one detail toward that end. Under the state laws, except in composition proceedings, an insolvency case is never closed. Under the bankruptcy act, however, the situation is different. A bankruptcy case is closed. The trust itself seems to be construed as a trust to settle the affairs of the bankrupt estate — as speedily and advantageously for creditors as possible — but definitely and conclusively. However it may be under the insolvency statutes, it has been held under the bankruptcy act that title to the bankrupt's estate vests in the assignee as

an officer of the court purely for the purpose of administering the estate under the proceedings in the case then in court, and as to any property undisposed of in the due execution of that trust, that the title reverts to the bankrupt as of his former estate upon the cessation of the trust, no re-conveyance being necessary. *Colie v. Jamieson*, 13 Nat. Bank. Reg. 1. *Hudson v. Schwab*, 18 N. B. R. 480.

Moreover an assignee is not obliged to assume the burden of profitless or worthless property of the bankrupt. Where the property is onerous and possession would carry a liability, there is a presumption, after the assignee has had reasonable opportunity to assert his claim, of an election on his part to reject the property. "It is for the assignee to determine whether or not in a given case he will assert his right to the property. He may elect not to charge the estate with the burden. Failure (to exercise his right within a reasonable time) may as against third parties be construed as an election not to claim the property." *Taylor v. Irwin*, 20 Fed. Rep. 615. *Amory v. Lawrence*, 3 Cliff, 523. "It may be assumed that the assignees regarded the expenditure of money in payment of annual dues and charges as not justifiable under the circumstances. At all events they took no steps to obtain possession, and contented themselves with the hope that masterly inactivity might enable them to assert a claim if by the efforts of (another) the load of debt was lifted, and the value of the property happened to increase. Their conduct must be viewed in no other light than that of an election not to accept this right as property of the estate." *Sparhawk v. Yerkes*, 142 U. S. 1, at 13. In *Sessions v. Romadka* a bankrupt owned a patent which he neglected to include in his schedule of assets, upon the ground that it was unproductive and of no value. After his own discharge and the discharge of his assignee in the bankruptcy case, he sold the patent, the purchaser having first applied to the former assignee, who declined to have anything to do with the

matter. It was held that this evidenced an election not to accept the property; and that the title so acquired from the debtor was good. *Sessions v. Romadka*, 145 U. S. 29.

But the examiner points out that a bankruptcy case though closed, may be re-opened on proper proceedings therefor. In such a case a new trustee would be appointed, and in him would vest the estate of the bankrupt as of the date of the original adjudication of bankruptcy, title being transferred by operation of law under the express provisions of the statute. U. S. Bankruptcy Act, sec. 70. *Bilafsky v. Abraham*, 183 Mass. 401.

The new trustee would take title, however, as did the former trustee, solely for the purposes of his trust. The law would not vest in him property which his predecessor had in good faith elected not to take. If any technical title to such an estate could be assumed as passing to him at all, it would enure only to the benefit of the purchaser. Such an election on the part of the trustee may be inferred from the facts in this case; but in addition there must be personal service of process on him in these proceedings. If after such service of process the trustee does not desire to be heard or takes no action, there may be a decree for the petitioner.

So ordered.

JOHN B. DAYTON, PETITIONER.

Middlesex, June, 1904.

*Dower — Tenancy in Common — Voluntary Partition —
Joint Tenancy.*

In this case the Examiner reports the title as subject to dower. The property was part of a large tract held by two tenants in common who made a voluntary partition by deed, there being no release of dower on the part of the wife of the petitioner's co-tenant. She had no dower however. *Potter v. Wheeler*, 13 Mass. 504. (1816.) Perhaps this case is so old that conveyancers are apt to overlook it. At all events the question has several times been raised by Examiners and parties. Aside from *Potter v. Wheeler* however, there would seem to be no doubt about the law. Dower is always subject to any incident which attaches to the husband's estate. Such an incident is the liability to partition, and "there seems to be no good reason why a voluntary performance of an act to which a party is compellable by law should not have the same effect as if produced by compulsion." *Potter v. Wheeler*, *supra*; *Flynn v. Flynn*, 171 Mass. 312.

A somewhat similar question has been several times presented as to release of dower where there is a joint tenancy. Here again the only available case in our reports is even older than *Potter v. Wheeler* and is to the effect that the wife of a joint tenant is entitled to her dower. *Holbrook v. Finney*, 4 Mass. 566. (1808.) This case is well known for other matters covered by the decision, but the dictum as to dower under joint tenancy was confined to the peculiar tenancy which existed under the short lived statute of 1783

(chapter 52) abolishing the principle of survivorship among joint tenants, which was repealed by Chapter 62 of the Acts of 1785.

Mr. Crocker merely expresses the opinion that "it seems" that no release of dower is required in a deed from joint tenants. Notes on Common Forms p. 141. The principle is perfectly plain, however, that to support dower the husband must have been seized and physically possessed of an inheritable estate capable of producing rents and profits. A life estate, an estate not vested in possession though vested in interest, an estate the possession of which is not definite and permanent either by reason of its physical or legal character, will not support dower. *Trumbull v. Trumbull*, 149 Mass. 200; *Wilmarth v. Bridges*, 113 Mass. 407; *Conner v. Shepherd*, 15 Mass. 164; *Woodman v. Sartwell*, 129 Mass. 210.

The contingency of death is an incident of joint tenancy as to which the right of dower of the wife is subject equally with the estate of her husband upon which her right must be founded. The dower which the wife of the survivor may ultimately have, arises not through an estate in joint tenancy, but through an individual and definite estate of inheritance "for that the joint tenant which surviveth claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower." Coke upon Littleton 37 b.

Decree for petitioner.

HENRY FROST *v.* CORNELIUS J. BRESNAN *ET AL.*

Middlesex, July, 1904.

Deed—Boundaries—Monuments—Practical Construction by Parties.

This case, like that of *Turner v. Belmont* which was tried with it, is a petition to register title to certain land on Brighton Street in the town of Belmont. All of the land on the east side of Brighton Street between Pleasant and Cross Streets was formerly owned by one Frost. Frost and his heirs sold it off in lots. The deeds affecting the lots in controversy call for certain distances, and bound by land previously sold to others and by land of the grantor. No natural monuments whatever are referred to in the deeds. At the time of the respective sales, however, the parties went upon the land, located certain existing monuments and secured the distances subsequently written into the deeds by measuring between these monuments. As to the lots previously sold to other owners from the Frost estate, the boundaries of none of them are fixed and definite. The lines of occupation differ materially from the lines called for by the deed distances, and even the location of the street lines is in dispute.

The question is therefore presented which is suggested in *Cornell v. Jackson* and *Miles v. Barrows*, whether, if there is no allusion to monuments in a deed, oral evidence is competent to show that the parties nevertheless made use of monuments in relation to the deed. *Cornell v. Jackson*, 9 Met. 150. *Miles v. Barrows*, 122 Mass. 179.

There appear to be no decisions squarely in point, and

analogous cases have been argued as indicating entirely contradictory conclusions.

Undoubtedly neither parol evidence, "practical construction" by the parties, nor other evidence outside the deed, can be made use of to explain the contents of a deed unless the instrument is itself ambiguous. Where an instrument is ambiguous or uncertain, oral evidence may be resorted to. *Crafts v. Hibbard*, 4 Met. 438. *Hooten v. Comerford*, 152 Mass. 591. *Methodist Society v. Akers*, 167 Mass. 560. These cases, however, rest solely upon the ground that the lines are not determinable from the deeds, and that oral evidence must be resorted to or the deed will fail. They are not in point in the present matter.

Where monuments are referred to in a deed, even if only as monuments which are to be subsequently erected, their subsequent erection and location may be shown, not as in any way explaining an ambiguous instrument or adding to or varying the terms of the deed, but as locating the monuments referred to in the deed. So in the cases at bar, the school house fences as built must be taken to be the fences referred to in the deed to the town, and the location may be shown and will control the deed measurements. *Miles v. Barrows*, 122 Mass. 179. *Beckman v. Davidson*, 162 Mass. 347.

So where the monument is itself not a natural monument like a post or fence, but a less tangible though equally defined monument such as a road or the land of a third party, oral evidence may be admitted to show the actual location of such definite monument. *Dodd v. Witt*, 139 Mass. 63. *Foley v. McCarthy*, 157 Mass. 474. *Dodd v. Witt* is a difficult and usually an unsatisfactory citation. The case can only mean that a "road" is always an indefinite or ambiguous expression in a deed when taken as a boundary to or from which the measurements must be made, and that the intention of the parties may, therefore, always be shown. If there is no outside evidence of intent, there will be a presumption

that in running to the road, title will carry to the centre, while in measuring from the road the measurement will begin at the side; but that this presumption, like all presumptions, being merely an artificial rule in the absence of actual evidence, will yield to actual evidence as to the location of monuments and measurements where such evidence can be produced. In *Foley v. McCarthy* the location of the road on the ground as designated by stakes, even though the stakes had never been seen by the grantee and differed from his deed and plan distances, was permitted to be shown, and held to govern, because the road was a monument, and the evidence was evidence of the actual location of that monument.

Where adjoining land is used as a monument and there is a discrepancy between the line of actual ownership and the line of actual occupation, there seems to be a distinct conflict between the cases. *Frost v. Spaulding*, 19 Pick. 445. *Cornell v. Jackson*, 9 Met. 150. *Sparhawk v. Bagg*, 16 Gray 583. In *Frost v. Spaulding* it is to be noticed that the head note and the opinion differ materially. In that case the line in question ran to "land of M," no monument being mentioned other than the land of M, thence by said M land to a stump and stones. The parties went on the ground immediately after the sale, and monuments were pointed out which, as a matter of fact, fell short of the true line of land of M. It was held that the monuments, though not referred to in the deed, were pointed out as boundaries immediately after the sale, were considered by the parties as such, and must control. It is to be noted, however, that the line of "land of M" was uncertain, and the court adds that that line is still undetermined. It seems to me that this is the point in the whole case. It is also to be noted however that this case is cited in the nearly contemporary case of *Magoon v. Lapham*, 21 Pick. 135, as merely being a case in which, it being evident that a mistake had been made as to the

boundaries and the deed being uncertain, parol evidence may be admitted, and the intention of the parties ascertained and carried out, whether the monuments govern the distances or the distances govern the monuments. In *Cornell v. Jackson* the deed bounded by "land of T," and there was a line of occupation different from the line of ownership. It was held that the line of ownership governed, and then follows a dictum that if the grantee wanted the line of occupation he should have required a reference to it in the description, or, at least, he should be able to prove that the monuments on this line were pointed out as indicating the limits of ownership at the time of the sale; and that such evidence would be admissible under *Frost v. Spaulding*. In *Sparhawk v. Bagg*, where the boundary ran by "land of T," and T owned to a definite line but had possession and had fenced to a line 16 feet further, it was held that by "land of T" his true line was meant. The question discussed was not a question, however, of a boundary line as a monument, but merely a question of whether the deed did or did not convey the grantor's title to the 16 foot strip, and was rather a distant forecast of *Wishart v. McKnight*, 178 Mass. 356, s. c. 184 Mass. 283.

In *Cleaveland v. Flagg*, and *Iverson v. Swan*, there was no fence alluded to in the deed or contemporaneously pointed out as the monument, nor was the fence set up with the view of making it a monument, nor was there any ambiguity in the deed. Neither had the fence stood long enough to amount to a disseisin. The fence had simply been erected on the wrong line; the true line was capable of being precisely ascertained, and there was no element of estoppel. *Cleaveland v. Flagg*, 4 Cush. 76. *Iverson v. Swan*, 169 Mass. 582. In *Coyle v. Cleary* and *Percival v. Chase* the "true line" was no longer the old deed line. It was not a question of variance from the deed line, but a new line had been acquired by adverse possession and had become the

true line. *Coyle v. Cleary*, 116 Mass. 208. *Percival v. Chase*, 182 Mass. 371, 377.

From all of the cases I am of opinion that (aside from any question of estoppel) where the land of a third party is referred to as a monument, if it is a definite monument its location may be shown and will control, but if it is not a definite monument capable of being precisely ascertained the intention of the parties may be shown by their acts or other suitable evidence. In the cases at bar the land of the adjoining owner was not a definite monument. Where the true line of such land was located, was not only not definite at that time but has been in dispute between the parties in these very proceedings. I think that it is competent to show that the parties went upon the ground and pointed out and adopted the fence as governing what they meant by land of the adjoining owner; and so with the red cedar post on Brighton street and the post in the rear as marking the boundary on the other land of the grantor.

W. H. H. Tuttle for petitioner.

Walter Soren, H. M. Burton and G. L. Wilson for respondents.

CLARA L. FERDEN *v.* FRANK A. DAVENPORT,
ET AL.

Middlesex, October, 1904.

Probate Court — Jurisdiction — Statutory Heir — Assignment of \$5,000 Estate — Pub. Stat. Chap. 124, Sec. 3, 17 — Guardian ad litem — Presumption of Regularity of Probate Proceedings.

Title in this case is claimed under an assignment by the probate court to Annie E. Smith as statutory heir of one Daniel Smith late of Sudbury. Daniel Smith died testate, seized of this estate, devising it specifically to certain beneficiaries for life, with remainder to the heirs of two of them in fee. The widow waived the will, claimed the portion of his estate to which she would have been entitled if he had died intestate, filed a petition under the provisions of P. S. Chap. 124 alleging that the deceased left no issue living and praying for an assignment of his real estate in fee to an amount not exceeding \$5,000, and obtained a decree reciting that all parties interested had been duly notified and that the deceased died without issue and ordering an assignment. This decree was contested by the executors on the ground that the probate court had no jurisdiction and that the deceased left issue, but the decree was affirmed, a warrant issued, and this estate was assigned to the widow. An agent was appointed for absent heirs, but there is no record of the appointment of a guardian ad litem to represent any person not in being to whom a remainder may have been devised. The assignment was confirmed by a decree which recited that all parties interested had had an opportunity to be heard.

The respondents are a remainderman under the will who was not in being at the time of the assignment, and a guardian ad litem appointed by this court to represent any other persons not yet in being to whom a similar interest may have been devised. They offer to show that no guardian ad litem was appointed in the probate proceedings, that said Smith did not die without issue, and that this estate was at the time of the assignment worth more than five thousand dollars; and it is agreed that the evidence offered, if competent, substantiates the fact that the testator left issue.

The jurisdiction of the probate court, however, was a jurisdiction consequent upon, or co-extensive with, its jurisdiction over the estate of the deceased. In the language of P. S. Chap. 124, Sec. 17, "the Probate Court having jurisdiction of the estate of said deceased shall cause such estate in fee to be assigned." *Sigourney v. Sibley*, 21 Pick. 101.

The "five thousand dollar" estate is not an estate to be created by the probate court if certain facts exist in a given case, but is an estate of inheritance, defined by its value until set off. *Lavery v. Egan*, 143 Mass. 389. *Eastham v. Barrett*, 152 Mass. 56.

The facts recited in the probate court's decree, and which the respondents offer in this case to controvert, were not facts necessary to the jurisdiction of the probate court, but facts to be adjudicated upon in that court.

While proceedings in the probate court are undoubtedly proceedings in rem or quasi in rem, the scope and binding effect of those proceedings and the adjudication therein may be expressly defined or limited by statute. Where no express provision for notice is given, nor express limitation is placed upon the scope of the adjudication, the notice to be given is left to the discretion of the court, and all persons are bound by the adjudication whether they receive actual notice or not. *Bonnemort v. Gill*, 167 Mass. 338. (Note, and see *Cleaveland v. Draper*, 194 Mass. 118.) If there was no such

express provision for notice, or statutory limitation as to the effect of the decree, then these respondents would be clearly concluded by the proceedings in the probate court. *Pierce v. Prescott*, 128 Mass. 140. *Harris v. Starky*, 176 Mass. 445. *McCooley v. N. Y., N. H. & H. R. R. Co.*, 182 Mass. 205.

There are, however, various statutory provisions relating to the conclusiveness of different probate proceedings. The persons upon whom partition by set-off shall be conclusive are expressly enumerated, and it is expressly provided that all other persons may pursue their legal remedies as if the proceeding in the probate court had not been had. Acts of 1882, Chapter 6. P. S. Chapter 178, Sec. 63, R. L. Chapter 184, Sec. 45. Partition by sale is made conclusive only on all parties to the proceedings for partition and those claiming under them. R. L. Chap. 184, Sec. 47. The set off of the \$5,000 estate under the provisions of the act of 1889 is made binding upon all parties and privies thereto. Acts of 1889, Chap. 234. Moreover, notwithstanding the general provision in R. L. Chap. 184, Sec. 45, that the partition shall be conclusive on all heirs and devisees of the deceased, it is further provided by Section 36 that the court shall appoint a disinterested person to act for any heir or devisee absent from the Commonwealth; and where the record of the proceedings failed to show that an agent was appointed for an absent heir the partition was held to be void as against him in a collateral proceeding. *Smith v. Rice*, 11 Mass. 507.

Under the provisions of the statute in force when the probate proceedings in this case were begun, when remainders in premises to be divided are devised to persons not in being at the time of the application for partition, notice shall be given to the parents of such persons, and the court shall appoint a person to act as the next friend of such persons not in being in all proceedings touching the partition. "The

partition made in such case shall be conclusive upon all persons to whom such remainder is devised as if they had appeared and answered in the case." P. S. Chap. 178, Sec. 70.

There is a very similar provision in the statute providing for the sale of estates subject to remainder, (P. S. Chap. 120, Sec. 20) and this latter provision has been held to be mandatory, non-compliance therewith rendering the decree invalid as against a person not then in being and having a contingent interest in the estate for whom a guardian ad litem was not appointed before the decree. *Pratt v. Bates*, 161 Mass. 315. It has been also held, with regard to P. S. Chap. 178, Sec. 70, that, notwithstanding the mandatory language of this section in regard to notice, the notice is not essential, or a condition precedent to the right of a petitioner to have partition, but the question upon whom such partition will have a conclusive effect was in that case not determined. *Taylor v. Blake*, 109 Mass. 513.

It is suggested by Judge Fuller in his notes to P. S. Chap. 178, Sec. 52, and R. L. Chap. 184, Sec. 36, (see both editions of Fuller's Probate Law) that the proceedings in the probate court call for two decrees, each separate, independent and final; one that the partition shall take place, and the other that the partition as made shall be confirmed; and that provisions for notice of the proceedings before the commissioners do not apply to the proceedings before the court on the preliminary question, the statute assuming that the court in its parental character will guard such interests while the proceedings are wholly in its presence. But this particular provision of P. S. Chap. 178, Sec. 70, applies by its terms to the appointment of a next friend to appear and act "in all proceedings touching the partition;" and Section 17 of Chapter 124 provides that the probate court shall assign the estate "in the same manner as in other partitions of lands of persons deceased."

It seems to me that the provisions of P. S. Chap. 178, Sec. 70, are also mandatory and explicit, and that if failure to comply with them were shown, these respondents would, as matter of law, not be concluded by the proceedings in the probate court. The petitioner contends however that it must be presumed, under the provisions of the presumption of regularity act of 1891, that these provisions were complied with. Acts of 1891, Chap. 415. R. L. Chap. 162, Sec. 2.

Prior to the act of 1891 it may safely be assumed that where the record of the probate court failed to show the appointment of a next friend, or affirmatively showed that such appointment did not precede the decree, in either case the proceedings would be held invalid in a collateral proceeding as against such interest. *Smith v. Rice*, 11 Mass. 507. *Pratt v. Bates*, 161 Mass. 315. Since the passage of that act, however, Judge Fuller is of opinion that if no irregularity affirmatively appears on the record, such a decree could not now be overthrown in a collateral proceeding. Fuller, Probate Law, pp. 394, 451.

Whether a presumption of regularity can cover a presumption of jurisdiction, as intimated by Judge Fuller, we need not enquire, for in this case the court had jurisdiction. The only question is whether the respondents were parties. The only offer of proof is as to facts, which, had they been proved in the probate proceedings would have necessitated a different adjudication and decree in the probate court. But if that court had jurisdiction, and the respondents were, or must be presumed to have been, parties to its proceedings, they are concluded by them.

I find no case directly in point, although it would appear from the original papers and briefs in the recent case of *McCooley v. N. Y., N. H. & H. R. R. Co.*, 182 Mass. 205 that the dictum in that case was intended specifically to cover the question now at bar.

Such a presumption may, as in this case, be contrary to

the probable facts, and, if so, virtually nullify the previously existing effect of P. S. Chap. 178, Sec. 70, but it must be assumed that the legislature in passing the Act of 1891 deemed it for the public interest that full reliance might be placed upon the adjudication and decree of a court having full jurisdiction of the case, rather than that the validity of titles under probate proceedings should be left open to the hazard of a complete regularity of record. The act of 1891 does not purport to be confined, nor is it necessary that it should be confined, as suggested by the respondents, to a presumption as to future probate proceedings; it provides rather a presumption for the future as to all probate proceedings. On the whole I think that under the Act of 1891 it must be presumed that the provisions of P. S. Chap. 178, Sec. 70, were complied with by the probate court, and that the respondents are, therefore, concluded by those proceedings.

The only remedy of the respondents, if any, is by petition to the probate court for a revocation of its decree. *McCooey v. N. Y., N. H. & H. R. R. Co., supra.* (Note, and see *Tobin v. Larkin*, 187 Mass. 279.)

Decree for petitioner.

J. O. Teele and F. F. Gerry for petitioner.

Wilfred Bolster for respondents.

A. A. POPE, ET AL., TRUSTEES, PETITIONERS.

Suffolk, October, 1904.

Trust — New Trustee — Lack of Both Deed and Appointment by Court — Transfer of Title by Operation of Statute.

In this case the Examiner raises the question whether title will pass from one set of trustees to another without either a deed of conveyance or appointment by the Probate Court, a question which seems to be left by the text books as somewhat in doubt, and on which there are no decisions under the present statutes. Notes on the Revised Laws, Chap. 147, Sec. 6; Notes on Common Forms, p. 226; Fuller's Probate Law, Chap. 147, Sec. 6.

The declaration of trust under which this property is held provided fully for the resignation and removal of trustees and the appointment of new trustees in their place, and further provided that "each and every new trustee shall have the same power, right and interest touching the trust estate, and be subject to the same duties as the original trustee appointed hereunder." Trustees have died, resigned and been removed, and new trustees have been appointed in accordance with the terms of the declaration.

Under the General Statutes (c. 100, sec. 9) title vested by operation of law in a new trustee appointed by the Supreme Judicial or Probate Court.

This provision applied solely, however, to an appointment made by the Court in its judicial capacity and under its statutory authority. Where a new trustee was merely "named" by a Judge of one of those Courts as the person

designated for that purpose by the instrument creating the trust, the statute did not apply and title did not pass to such new trustee thereunder. *Nat. Webster Bank v. Eldredge*, 115 Mass. 424.

After the decision in the Webster Bank case, and apparently in consequence of it, Chapter 254 of the Acts of 1878 was passed, providing that the provisions of Section 9 of Chapter 100 of the General Statutes should apply to trustees "chosen or appointed in conformity to any written instrument creating a trust in place of former trustees thereunder."

Although Webster Bank *v.* Eldredge is cited in Mr. Crocker's Notes on the Statutes (Notes on Public Statutes, p. 368, Notes on Revised Laws, p. 460), the Act of 1878 seems to have escaped observation.

Chapter 141 of the Public Statutes, Section 6, provided that a new trustee appointed by the Probate Court in judicial proceedings or appointed in the place of a former trustee in conformity with a written instrument creating a trust, shall have the same powers, rights and duties as if he had been originally appointed, and the trust estate shall vest in him in like manner as in the trustee in whose place he is substituted, and the Court may order any conveyances which it may deem proper or convenient to vest the estate in the new trustee. This left out the phrase "chosen or appointed" employed in the 1878 act, but it was clearly not intended to change the law and thereby eliminate such cases as the one at bar from the operation of the statute. The word "appointed" must be held to cover all methods of designation of the new trustee, either by the Court in conformity with its statutory authority, or otherwise in conformity with the provisions of the instrument creating the trust.

In the Revised Laws, Chapter 147, Section 6, the clause providing that the trust estate shall vest in the new trustee has been omitted, while that providing that the Court may

order such conveyance as it may find proper or convenient to vest the estate in the new trustee has been retained, and this obviously troubles the Examiner. The omission of the clause as to the estate vesting must be deemed to be merely for the purpose of effecting what the Commissioners on the revision of the statutes considered the elimination of unnecessary verbiage, and not a material change in the law. The statute still provides that the new trustee shall have the same powers, rights and duties as if he had originally been appointed. The retention of the clause providing for a conveyance seems to relate solely to the case of a new trustee appointed by the Court. This last clause itself might perhaps have been much better omitted, as is very vigorously suggested by Judge Fuller in his notes on this chapter above cited.

On the whole however it would appear that whether under the provisions of Chapter 254 of the Acts of 1878, Chapter 141 of the Public Statutes, or Chapter 147 of the Revised Laws, no conveyance is necessary from an old to a new trustee chosen or appointed in his place in conformity with the provisions of a written instrument creating a trust, but that the estate vests by operation of law.

Decree for petitioner.

HENRY A. WYMAN, TRUSTEE ET AL., v. MELINDA
MITCHELL ET AL.

Plymouth, October, 1904.

*Evidence — Opinion — Expert Testimony — Surveyor —
Ancient Bounds — Adverse Possession — Indian Titles
and Occupation.*

These cases are petitions for the registration of title to certain tracts of land lying within the limits of Betty's Neck, a point lying between Assawampsett and Pocksha Ponds in Lakeville, which, at a meeting of the Proprietors of Assawampsett Neck, May 11, 1697, was layed out, as a part of lands then rightly belonging to the Indians, to one Betty Sausaman, under whom the respondents claim title by devise and descent.

The respondent, Melinda Mitchell, a woman of intelligence and education and a well known authority on matters of Indian history and tradition in this locality, appears officially in this case in full Indian costume, with paint, feathers and wampum, as the Princess Teweelema, and claims the land in her Indian right as being the last remaining property of the aborigines, land which has never come under the private dominion of the white man. The claim is a somewhat startling one, but is presented in good faith and with the assistance of learned and able counsel. The respondents trace, and it is admitted prove, their descent from Wattuspaquin, otherwise known as the Old Black Sachem, a sister of King Philip. Wattuspaquin and her son conveyed this property to the Indian Assowetough, known to the English by the name of Betty, by a deed which ran to

the said Betty " forever and especially her eldest daughter." Betty later by her will devised this property to her eldest daughter and her heirs forever, and of the said eldest daughter the present respondents are the only living heirs. Betty's grand-daughter and her descendants have ever since lived on a portion of the land where there still stands a house occupied by these respondents.

Betty's great-grandson, one Paul Squin, had a house on a part of the Wyman tract, together with a garden and an orchard of wild apple trees, some of which were planted by the said Paul; and Paul's sister, who was the grandmother of the present respondents, lived on the lot now occupied by the respondents, and also after Paul's death cultivated the tract on which he had lived, and sold apples from his orchard. Later she moved to Abington, but continued to plant crops on different portions of the Wyman lot, and once a year to gather them, and continued to use the orchard until her death in 1839. Since then the respondents have from time to time gathered apples from the orchard, cut fire wood wherever and whenever they pleased, and pastured two or three cows on the Wyman tract.

The petitioners claim the land both by grant and by prescription. They show a complete record title since 1832, claiming under one Noah Clark, who lived on the Wyman tract not far from the Squin house prior to 1806, at which time no one other than Clark and the Squins lived on any of the lands in controversy. The Wyman tract has been cleared, fenced, and portions of it occupied for crops and for pasturage for over fifty years by the petitioners and their predecessors in title. The standing wood has been several times cut by them and either sold or burned for charcoal, and the charcoal burner boarded with the respondents for several weeks during one period of burning on the Wyman tract. All of the parcels which constitute the land in question have been severally assessed since 1853 to the recorded

owners under whom the petitioners claim title, and the taxes have been paid by them. There has been but little actual occupation of the DeMoranville land, and the boundary lines of that tract are extremely vague. No Indian occupation has been shown in regard to it. The petitioner, DeMoranville and his predecessors in title have cleared it, sold off the wood, at times fenced it, planted a portion of it, and paid taxes on the whole. The boundaries called for by the deeds and made use of on the grounds have been merely ditches. The surveyors employed by the respective parties have made an attempt to plot this tract from the deeds. The petitioners' surveyor has further made a plot from an elaborate survey and study of all neighboring tracts, and of all of the grants and deeds of the Indian lands that can be found of record. I admit his plot and conclusions in evidence, and adopt his boundaries except in so far as they have been encroached on by the respondents' fence. The land actually occupied and fenced by the respondents, now and for over twenty years past, is not claimed by the petitioners.

The matter of the admissibility of the plot made by the petitioners' surveyor raises a question which has several times arisen in this court, and as to which there seems to be very little authority, and no decision exactly in point. The principle involved, and the cases appearing on it, are very fully discussed in Wigmore on Evidence, Sections 1917-1926. The two objections made to the admissibility of this plot are the familiar ones that opinion is not evidence, and that the matter in question is the very matter to be passed upon by the Court. Unquestionably it lies at the very foundation of the law of evidence that a witness must be a knower and not a guesser, but back of that and at the basis of the question whether the witness is a knower or a guesser lies the further question whether he is testifying from facts or merely from hearsay. The opinion of the expert which is based on facts is itself fact, or the nearest approach to fact

that is available. Lord Mansfield in the old case of *Folkes v. Chadd*, 3 Dougl. 157, rests his decision practically on this ground, and so, to quote one of the very few "surveyor" cases to be found in the books, the court in *Forbes v. Caruthers*, 3 Yeates 527, says, "Mere abstract opinion is not evidence, but a surveyor or any other person conversant on the subject may state facts, and his opinion on those facts." In *Forbes v. Caruthers*, as in all of the early cases, the "opinion" of the witness was not the material part of his testimony; it was the "facts" that lay within his peculiar knowledge. The "facts" themselves in many cases of "opinion" testimony, however, were so very peculiarly within the sole knowledge of the witness, or of others possessing his peculiar qualifications, that the line of demarcation between facts and opinion in such cases became less and less clearly marked until it fairly disappeared in the typical instance of what afterward became known as the "expert," the man to whom alone, to the exclusion alike of court, jury, and the ordinary witness, the facts are known or properly comprehensible, and whose conclusions based on the best and only available data, namely, that of his own experience, are in themselves much more essentially fact than they are opinion. The only test as to such evidence is, and always has been, merely whether the witness has a sufficient basis of personal acquaintance with the matter, a sufficient amount of his own "facts," i. e., his own personally observed data, to justify listening to his opinions, or accepting his conclusions, as evidence. Wigmore, p. 2546, sec. 1917. The objection that the witness is, in a way, passing upon the very question before the Court is not necessarily fatal to the admissibility of his testimony. *Transportation Line v. Hope*, 95 U. S. 297; *Poole v. Dean*, 152 Mass. 589. The admissibility of the assistance of skilled persons to aid the court has been recognized from as far back as 1333. Wigmore, section 1917, and cases there cited. The expert is not presented as

a side judge, he is presented as a witness, and his conclusions, or opinions, or however otherwise they may be fairly designated, are offered merely as evidence; in substance and in reality as "facts," to be, like all the other facts and evidence, properly weighed and considered by the court. It was to the confusion between "opinion" which was mere guess work and "opinion" which really represented an ultimate conclusion or statement of fact arrived at by one exclusively, either as an individual or as a member of a limited class, possessing the peculiar and necessary data for stating the fact, that is to be attributed much of the loose and misleading language to be found in some of the decisions in the early American cases on which has been founded the doctrine that opinion is not evidence, and that a witness can not testify to an inference which it is for the court or the jury to draw if the facts warrant it. The true rule, as pointed out by Professor Wigmore, seems to be merely the old and really basic rule for the exclusion of superfluous matter. If the facts are within the ken of the court, the expert is not needed, his opinion adds nothing to the facts in the case, and his testimony is not admissible. If on the other hand his "opinion" is really a statement or presentation of fact not otherwise available, and drawn from his own peculiar experience and knowledge, whether he be a scientist or merely a layman with exclusive and unusual personal data, his testimony is really evidence, and admissible as such. The whole matter was stated with characteristic succinctness by the late Chief Justice Doe in *State v. Pike* 49 N. H. 399, 423: — "Opinions, like other testimony, are competent in the class of cases in which they are the best evidence." See also note to Greenleaf on Evidence, section 440 A, and the cases there cited.

The matter of qualification raises a distinct, though correlative, proposition. It rests upon the same broad principle however. Unless his facts are facts, he can not state their sum, substance or result. Neither can he do so unless his

opportunities for observation and conclusion have been such as to enable him to properly state the results or substance of the data which he has acquired. He must not only have had personal observation, but be also possessed of special skill in interpreting the result, and if the court has the same skill, the witness' inferences or "opinion" must be rejected, and rejected as before, simply because it is superfluous. "A practical surveyor cannot be asked whether in his opinion from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram." Greenleaf, Section 440 A. In the case at bar, however, the witness had made a special study of the entire tract covered by the Indian grant or reservation, not only by surveys on the ground, but by a study of all of the records and deeds relating to it. This same question has arisen in the somewhat similar cases of ancient mill privileges, and of the proprietors' allotments of common lands in the Essex woods and elsewhere. In ordinary cases this court is, or ought to be, in itself expert in determining the location even of ancient grants, and yet there is nothing in my own experience as to which, from the rapid changes that have taken place in certain localities, expert testimony has become more useful and even necessary to the court than as to the matter of ancient land marks and boundaries. The question seems to me to be fairly akin to that of testimony as to value, and I think the evidence admissible.

So far as the petitioners' title by grant is concerned the land appears to be a portion of that which was before the court in the case of *Clark v. Williams*, 19 Pick. 499. Whether the plaintiff in that case is the same Noah Clark as the one under whom the petitioners claim, does not appear. However that may be, the language of the court in that case seems applicable to the case at bar. "After a lapse of two hundred years, we are to presume that the township of

Middleborough" (from which Lakeville was set off in 1853) "was duly granted to the Proprietors, and set off to hold in severalty amongst themselves, and that the Indian right of occupancy shall be presumed to have been extinguished, unless the contrary is shown. When a small tract of land in an old settled town has been occupied by a person of Indian origin, in the same manner that similar lots are occupied by white settlers, we think it is not now to be presumed from the circumstance of his Indian origin alone that the aboriginal right of occupancy has not been extinguished, and that he holds under that right." The respondents claim that in the case at bar the contrary is shown, and that the land in question was by the vote of 1697 expressly set off from the lands granted to the Proprietors, and laid out to the then Indian owners, whose Indian right of occupancy, it is shown by the evidence in this case, has not been extinguished. The petitioners rest their case, however, principally upon title by adverse possession. As to this claim the case appears to be perfectly simple. However unfortunate it may be from the standpoint of those who at this day sympathize with the Indian race, it is nevertheless a fact, that the laws, customs and dominion of the white man and not those of the Indian have prevailed even, and perhaps particularly, to the extent of recognizing and legalizing titles acquired by adverse possession. Whether this be simply the right of might, or as it may be more fairly regarded, the proper, just and necessary foundation of the whole English law of real property, it is the sort of occupation and possession necessary and proper to the needs of the white man rather than that necessary to the needs of the red man that is the test as to the acquirement of title by adverse possession. The Indians did not at first apparently grasp the idea of individual ownership in fee, and in selling land to the white men seemed to consider that they were simply admitting them to joint privileges in the tribal property, without thereby excluding themselves.

The rights of the Indian occupying land expressly reserved for Indian use and occupation are expressly and carefully guarded by the ordinances both of the Massachusetts and the Plymouth colonies so as to prevent their elimination, and this was done both to prevent the Indian from being imposed upon, and also to protect the government in its exclusive privilege of extinguishing and acquiring the Indian's right of occupancy when circumstances might warrant it. See *Clark v. Williams, supra*. The present Indian claim is not made under any such right. These respondents claim under Assowetough or Betty, to whom the land was originally set off by the Proprietors of Middleborough, both by descent and by deed. As to all of the land it seems to me that the claim of title and the mode of use thereunder by the Indians has been characteristic of Indian occupation, while that of the white man has been such as by law creates, and conclusively establishes, ownership against it.

Decree for the petitioners.

J. J. Higgins for petitioners.

L. E. Chamberlain and G. W. Stetson for respondents.

MALCOLM McLOUD, TRUSTEE, v. ABBIE B. HALL,
ET AL.

Plymouth, November, 1904.

Easements — Implied from Plan — Estoppel — Determined by Abandonment.

The land in controversy in this case is a portion of a thirty-seven acre tract on the shores of Hull bay which about forty years ago became the scene of an elaborate, abortive and more or less fraudulent land boom. The land was then, as to a great extent it still remains, a large cleared field, which had formed a part of an ancient farm. It lies on a hillside distant from the settled portion of the town, and separated even from the summer residences and public streets by fields and woods. It has a fine outlook over the bay. In 1874 it was purchased by some speculators, who had drawn and recorded an elaborate plan showing a very large number of small house lots, divided by streets, alleys and spaces reserved for prospect and access to the sea; and then by various devices, including the use of a straw man bearing the same name as a well known Bostonian, secured a large mortgage, and sold a considerable number of the "lots." In addition to the recorded plan, these lots were staked off upon the ground, and some of the "streets" were further marked out by removing the sods. The boom quickly collapsed, however, and except for the foreclosure of the mortgage after sundry partial releases therefrom had been given, a few transfers, and some tax sales, nothing more was done in furtherance of the original scheme. Within the past few years summer residences have been built near by, and two houses have been erected

on the thirty-seven acre tract itself, but without any regard to the lot or street lines of the plan. Access is obtained thereto by a private street.

The petitioner owns a tract of land on the water front which covers a large number of the original lots, and seeks registration of title free from any easements of streets or alley ways arising under the recorded plan. The respondents own other lots shown on said plan, and claim rights of way, not by express grant, but by implied easements arising from the language of their deeds wherein their respective premises were bounded by the streets and alley ways shown on said plan, not only from their lands by a reasonable way, provided and admitted by the petitioner, out to a public street, but in all of the streets and ways shown on said plan, and especially in the one running along the front of the petitioner's tract by the shore, and with access therefrom to the sea.

The doctrine of implied easements is entirely a doctrine of estoppel. There is no question about the general rule, or about the cases which are cited by the respondents. The estoppel in these cases, however, like all other cases of estoppel, as is manifest from the decisions, rests upon the general principle that a man who has obtained a valuable consideration from another in consequence, in whole or in part, of assurances or conduct whereby the other was given directly to understand, or was justified in presuming, that he should receive certain rights or advantages, is thereby estopped from denying to the other the benefit thereof. *Parker v. Smith*, 17 Mass. 413. *Farnsworth v. Taylor*, 9 Gray 162. *Rodgers v. Parker*, 9 Gray 445. *Fox v. Union Refinery*, 109 Mass. 292. *Boland v. St. John's Schools*, 163 Mass. 229.

The language of the court in some of the cases, notably in *Farnsworth v. Taylor*, goes to the full length for which the respondents contend. The facts in all of these cases differ materially however from those in the case at bar. The

difference is not merely that in the present case none of the streets or ways were ever in actual existence on the ground. Whether there are or are not any actual decisions on the point, there are plenty of dicta, and it is clearly within the general principle, that an implied easement that there shall be a way enures to the benefit of the grantee and his successors in title as against the grantor and those having privity with him, whether the way was ever in existence or not. *Crowell v. Beverly*, 134 Mass. 98. *Driscoll v. Smith*, 184 Mass. 221. *McKenzie v. Gleason*, 184 Mass. 452. There are no cases, however, in which an easement of a way is to be implied where it is of no advantage to the estate of the grantee and those in privity with him. Such a case is entirely outside the principle of estoppel. Where there is an elaborate system of ways, or a diversity of easements, such ways and such easements only are held to be created by estoppel as are necessary to a reasonable and advantageous use of the premises granted. *Regan v. Boston Gas Light Co.*, 137 Mass. 37. *Pearson v. Allen*, 151 Mass. 79. *Loehr*, Petitioner, Land Court Decisions, p. 46, *ante*. *Central Wharf v. India Wharf*, 123 Mass. 567. *Bangs v. Potter*, 135 Mass. 245.

In the case at bar not only are the ways and easements claimed not in existence on the ground, but many of them are impracticable and some of them are impossible. The whole scheme, so far as its essential elements are concerned, is, and always was, purely a paper scheme. That the respondents are entitled to a reasonable way out from their land to the public street is undeniable, but that the entire scheme in accordance with which the respondents originally purchased their lots should be held to be still binding upon all the lots into which this tract was theoretically divided, would be, instead of a benefit, a hopeless burden upon all of the property, including that of the respondents themselves.

The fact that the scheme which the respondents insist upon

is one which would render the entire tract unmarketable and useless for the future as in the past, is a fact which must be taken into consideration by the court. That the streets obviously cannot be built upon the ground as a physical matter in accordance with the plan; that some of them would be useless if they were built; that the entire tract is, always has been, and apparently will continue to be hopelessly unadapted and unadaptable to use for the scheme represented by the plan, is evident from an inspection of the premises.

It is argued by the respondents that nothing has actually changed in the situation, however, in the thirty years since the scheme was originally laid out, or since the respondents purchased their lots; and that there has been no abandonment such as is manifested in the reported cases where restrictions and easements have been held to be determined by a change in the character of the locality. It is true that there have been no active steps taken by the respondents whereby they in turn are estopped from claiming their original rights. But they purchased their lots in accordance with a scheme looking to the immediate development of the entire tract; they were parties to, and relied upon, a staking out of portions of the roads called for by the plan, and to some slight beginning toward the construction of such roads by the removal of the top sod from parts of them; and thereafter they sat still and saw the stakes disappear, the proposed roads go back into grass lands, portions of the original tract built upon, fenced and occupied in entire disregard, and to the exclusion, of some of the streets as planned, lots repeatedly sold for taxes, some of these tax titles being acquired by the petitioner, and the whole scheme generally allowed to lapse for thirty years into desuetude, all without protest or action on their part. See *Snow v. Hutchins*, 160 Mass. 111. Under all the circumstances of the case I think the respondents are not in a position to insist (in spite of a lack of positive acts

by them ordinarily necessary to an actual estoppel) upon a claim, as against other individual lot owners including this petitioner, to any easement created by implication of law in favor of their estates in the streets and ways provided for in the plan.

Neither does it seem to me that the easements can be separated one from another, so that it can be fairly said, as is contended, that the respondents are at least entitled to the benefit of air and prospect in the road shown on the original plan and running along the margin, or near the margin, of the ocean. That road could neither be located nor constructed as shown on the plan, and its use for the purposes of the respondents is fairly dependent upon the existence of the original scheme as a whole. Persons other than the petitioner have been allowed by the respondents to buy and improve portions of the original tract in the only way in which they could be improved, namely, by a total disregard of the plan; and to acquire rights and estates hostile to the whole scheme of the plan by adverse use and occupation. I do not think that the respondents are in a position to demand that the petitioner be prevented from making use of his property as a matter of right equally with others whom they have permitted, if their contention is sound, to do so as a matter of wrong.

The case does not seem to me to be in any way parallel to the familiar cases in the books, or within the usual technical rules, or one in which any of the essential elements of estoppel can properly be invoked. So far as the claim of easements in favor of the land of any of the respondents over the premises claimed by the petitioner is concerned, I find for the petitioner, and order a decree free from any easements.

Decree accordingly.

N. M. Nye for petitioner.

C. H. Johnson, T. H. Buttimer, A. P. Worthen for respondents.

DARWIN C. GOODALE, PETITIONER.

Middlesex, February, 1905.

Condition — Terminated by Power of Attorney to Enforce, Coupled with Covenant to Stand Seized — Recital by Subsequent Grantors not Equivalent to Reimposition.

In 1805 Royal Makepeace conveyed a tract of land, including locus, to one Whitman, "provided, however, and this deed is on this express condition, that no building less than three stories high or of other materials than brick or stone shall ever be erected on the front part of the lot adjoining Concord Street, anything herein to the contrary notwithstanding."

In 1846 the premises were conveyed by one Russell, successor in title to Whitman, by a deed in which the Makepeace condition was repeated verbatim.

In 1846 Makepeace gave to one Bent a power of attorney under seal to release and discharge upon such terms and for such consideration as his attorney might judge expedient, any or all conditions, provisos, restrictions and encumbrances to which any of Makepeace's land in Cambridge might be subjected by the terms of any deeds by him given, and to release and discharge any part of said lands from such conditions by deed or otherwise, and also to enter upon and take possession for breach of condition any property theretofore conveyed by Makepeace upon condition, and thereby revest the title in said Makepeace for such breach of condition, and in consideration of one dollar paid by said Bent, said Makepeace, for himself, his heirs and assigns, covenanted with said Bent, his heirs, executors, administrators and assigns,

to stand seized of all lands the title whereof should be re-vested in Makepeace by means of any such entry, to the use of said Bent, his heirs, executors, administrators and assigns. Makepeace died June 6, 1855. In May, 1856, said Bent, purporting to act as attorney of said Makepeace by virtue of the instrument above recited, granted, sold and conveyed to the then owner of locus all the conditions contained in said deed from Makepeace to Whitman, habendum in fee.

It is unnecessary to determine whether the condition in the Makepeace deed is to be construed as a condition at common law, or a restriction. It is clearly a condition, unless the fact that it prohibits the use of the land in more than one particular way necessitates its construction as a restriction under the doctrine suggested in *Appleton v. Episcopal City Mission*, 117 Mass. 326, and similar cases. If it be a restriction it may be disregarded in this case, for the reason that the character of the property and of the neighborhood has so totally changed that the purpose for which it was imposed no longer exists. If it be a common law condition it was released by force of the instrument from Makepeace to Bent. It is true that during the lifetime of Makepeace the condition was not released by Bent, and on Makepeace's death, any existing right of reverter would have passed to his heirs. But I think that the attempted power of attorney coupled with the covenant to stand seized, must in itself be considered a determination of the right of reverter in Makepeace. No particularly technical form of grant was necessary for this purpose. The principle of law by which a right of reverter is held to be terminated by an attempted grant is purely a principle of public policy; a policy which is controverted fully as much by the attempted power and covenant to Bent as it could possibly have been by a full grant. The policy of the law does not permit the buying or selling of inchoate rights. The policy is a policy

against maintenance and champerty, and for "suppressing of rights and stirring up of suits, which would happen if men were permitted to grant before they be in possession." It was a policy by which any attempt to convey to a third party a right or possibility or re-entry for forfeiture of an estate, which ought to be strictly limited to the grantor and his heirs, (and, in Massachusetts, residuary devisee,) was made unlawful and void. The attempted transaction between Makepeace and Bent was one by which Makepeace parted with his entire real interest in the estates, giving Bent as full power either to release the conditions, or enter for their forfeiture as though he himself had originally imposed them, giving to Bent all pecuniary results, and covenanting to stand seized for his benefit of the legal estate also. This comes as fully within the doctrine of the Massachusetts cases, as though it had been a deed in ordinary form. *Guild v. Richards*, 16 Gray, 309, 317; *Rice v. B. & W. R. R. Co.*, 12 Allen, 141.

The clause in the later deed from Russell to Dudley appears to be a mere recital of the condition, and not a reimposition of it. The scrivener seems simply to have copied his grantor's deed. The peculiar language is quoted verbatim, and there is nothing to indicate that it was intended to be a separate condition with a separate right of forfeiture in Russell. There seem to be no decisions squarely in point, but the principle is well recognized that in such a case the phraseology of the later deed may be construed merely as a statement of the condition already existing. *Cassidy v. Mason*, 171 Mass. 507; *Clapp v. Wilder*, 176 Mass. 332, 336. It might further be questioned whether on the principle suggested in *Appleton v. Episcopal City Mission* it can fairly be said to have been the intention of the second grantor to reserve to himself an inchoate estate liable to be extinguished by the very act necessary to give it birth.

Decree for petitioner.

ASA J. SMITH, PETITIONER.

Hampshire, February, 1905.

*Deed — Use — Words of Inheritance Lacking — Fee —
Resulting Use.*

This case raises an interesting question under the Statute of Uses.

One Jefferson Hill deeded locus for a consideration paid by one Derby, habendum to him, Derby, his heirs and assigns, to the use, behoof and benefit of Samuel T. Murdock and his wife Charlotte, during the natural lives of each and both of them. Annexed to that deed, of even date and recorded with it, was a covenant by said Derby "the within named grantee," in consideration of love and affection to his mother Charlotte M. Murdock and her husband Samuel T. Murdock, to stand seized of said land for the use and benefit of said Samuel and Charlotte during their natural lives. And recorded three years later, but of even date with the deed from Hill to Derby and its annexed covenant, is a mortgage from Derby to Hill with full covenants of warranty. Title thereafter comes under said Derby, the immediate deed from him being expressed to be subject to a life lease to said Charlotte and Samuel.

The examiner reports adversely on the title, being of opinion that the deed from Hill to Derby conveyed only an estate for the lives of Samuel and Charlotte Murdock. It seems to me, however, that that deed conveyed a fee.

It is the province of the habendum proper to declare the extent of the estate. Perkins, P. B., 174. The use is not an essential part of the deed and is not necessary or proper to

the passing of the fee. Leake, Land Laws, Chap. 3, Sec. 2. It is true that words of inheritance are as necessary to the creation of an estate in fee under the use as under the grant, but in this deed there is no question of any intention to create a fee under the use to Charlotte and Samuel. The sole question is as to the use after their life estates, there being no express declaration in regard thereto. The Statute of Uses simply worked a conversion by operation of law of the existing use whatever it might be (for life, for years, in remainder, or in fee) into a legal estate and seisin of corresponding extent.

Express declaration alone is not the only method for the creation of a use. A use may arise either from express declaration or merely by implication from the payment, or lack of payment, of a consideration. The use did not have to be in writing until the passing of the Statute of Frauds, and even under the Statute of Frauds the necessity for a declaration in writing is confined to a declaration for the benefit of third parties. A resulting use is not covered by the provisions of the Statute of Frauds. Saunders on Uses, 5th ed., p. 104. The recital of consideration in the deed serves as an implied declaration of the use to the feoffee when not otherwise expressly disposed of. 1 Coke, 24a, Porter's Case.

If there were no declaration to uses, and no recital of payment of consideration, then the use resulted to the grantor. Not only so, but the grantor remained in as of his old estate, and under Lord St. Leonard's Act even the scintilla juris in the feoffee was extinguished, or rather immediately transferred back to the grantor under the resulting use, so that the practical result reached was, as stated in modern phrase, that the deed being without consideration was invalid. As a technical matter, however, the fee passed, but under the Statute of Uses and Lord St. Leonard's Act, passed back again instantaneously. And so "if the conveyance be in fee

and the use be for a particular estate only," (as in the case at bar) "and no consideration appears to carry the residue, so much of the use as is undisposed of by the declaration remains in the grantor." Leake, Land Laws, p. 107. "To conclude this point, whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter." Co. Lit., 23a.

It is further stated by Leake that a consideration paid in such cases will be presumptively attributed to the estate limited, and, therefore, will afford no inference as to the use undisposed of. The citations to this last statement in Leake do not, however, sustain that proposition to its full extent. The case put by Saunders is that of an estate for valuable consideration to the feoffee and heirs, to use of them for their lives, and he says that the remainder of the use will result to the grantor, "for the extent of the express limitation is the measure of the consideration." It is because the use is to the feoffee himself for life that the use is obviously exhausted by the consideration, and in the same paragraph he adds, "that it is the intention of the parties to be collected from the face of the deed that gives effect to resulting uses." Saunders on Uses, 5th ed., p. 102. This last statement is the key to the whole situation. It is the intention of the parties that governs. Where it is obvious that the feoffee is not to have the full beneficial estate, he will not get it at law under the Statute of Uses any more than in equity under the law of trusts, and vice versa.

Where an estate is given to a trustee as trustee expressly and solely to carry out certain trusts which fail or determine, the residue results. *Ellecock v. Mapp*, 3 House of Lords Cases 492. Where a grant is to a trustee of the entire fee,

but merely subject to certain trusts which fail or determine, the residue will not result. *Clarke v. Hilton*, L. R., 2 Eq. Cas. 810. These last cases with full notes are to be found in Professor Ames' *Cases on Trusts*. And so a resulting use may be rebutted by even a parol declaration in favor of the conusee. *Sudgen's Notes to Gilbert on Uses*, p. (57).

A use shall not result against the intention of the parties. So although upon a fine levied without consideration or declaration of a use, the use will *prima facie* result to the conusor in fee. Yet if even several years afterwards a precipe is brought against the conusee and a recovery suffered, the use shall be held to be fixed by the intent of the parties in the conusee in order to make him a good tenant to the precipe. *Sug. Gilbert*, p. (64); *Altham v. Marquis of Anglesey*, *Gilbert*, Eq. p. 16; *Thrustout v. Peake*, 1 Strange, 12. These last cases, although decided nearly two hundred years ago, are practically on all fours with the case at bar. Here the presumption, if there be one, of a resulting trust is rebutted by the mortgage back of the entire estate to the mortgagor. The use must be held to be fixed by the intent of the parties in the grantee in order to make him a valid grantor to the mortgage.

But even without this it does not seem that the consideration paid by the grantee for an estate in fee can be deemed to be exhausted by the creation of an estate for life in favor of his mother and stepfather. It would have been far more natural to have secured a mere life lease to them direct from the grantor. The whole complicated machinery used (or misused) by the parties, indicates an attempt to carry out of the grantor, and into the grantee, an estate in fee, subject to a life interest in favor of the two life tenants.

As said in another recent case in which the parties had become entangled in an attempted feoffment to uses, "in a case of difficulty depending in nice and not very well defined

distinctions, where all the parties legally and equitably interested have acted on a particular construction of a deed or deeds, it is wise to follow that construction unless it is forbidden by some positive rule of law." *Dakin v. Savage*, 172 Mass. 23.

Decree for petitioner.

LEROY S. STARRETT *v.* WALLACE LORD ET AL.

Worcester, May, 1905.

Land Registration Act — Practice — Examiner's Abstract and Report — Deeds Not in the Direct Chain of Title — Burden of Proof — Prescription.

The principal question in controversy in this case is as to the right of the respondents, who are the owners of mill privileges situated on a canal leading from the south branch of Miller's river in the town of Athol, to maintain a dam across the north branch of the river from land of the petitioner. The right in question is claimed partly by grant and partly by prescription. In the course of the trial among other matters (not now material) one or two questions as to practice have arisen in regard to which a brief memorandum may be useful.

The petitioner asks for a ruling that the report of the examiner is not to be considered as evidence. The Land Registration Act provides for the appointment of examiners of title (sec. 11) and for their search of the records, investigations of the facts, and report thereon, to the Court, concluding with a certificate of opinion upon the title. The opinion of the examiner thus provided for is clearly for the assistance of the Court and not intended to be, nor is it susceptible of being, taken as evidence. The investigation of facts by him, although *ex parte*, is nevertheless a quasi judicial investigation, by a disinterested person, a sworn official of the Court, provided by statute for that purpose. An abstract of the records is not only a convenient, but necessary, piece of machinery in the administration of the Act.

The opinions of the examiner are not treated as evidence; the facts reported by him are; but neither the statute nor the practice of this Court gives them any other character than that of evidence submitted to the Court; much like testimony taken by deposition. If any portion of the evidence is not properly admissible, as for instance, the abstract of a deed not properly acknowledged, or an instrument foreign to the title, it is open to any party to object to it. Nor is it binding upon the Court, if admitted, otherwise than is any other evidence.

The petitioner next urges that many of the deeds contained in the abstract are foreign to the title. The Examiner has included in his abstract all deeds of the immediate locality which seemed to him to throw any light on the history of the title or to aid in identifying or locating any of the grants. I exclude all of these, whether in the official abstract of title or offered by the respondents, that are not in the direct chain of title, either of the petitioner or one of the respondents. The rest I admit. Those that are in the direct chain of title of any of the respondents after it diverges from the common title, are, of course, not evidence of the existence of the right which they recite or purport to convey, but are, it seems to me, clearly admissible as showing the nature of the respondents' claim in regard to their user, and also, while not evidence as against the petitioner of the existence of the right claimed therein, nevertheless are evidence of the existence and location of the thing in question, to wit: a dam; as well as of the practical construction given by the parties to those direct grants which are in themselves vague or uncertain. See *Bagley v. N. Y., N. H. & H. R. R. Co.*, 165 Mass. 160.

As to the burden of proof, most of the cases cited relate to the particular form of action there under consideration. In these proceedings the petitioner chooses to assert a title as against all the world, and to ask to have it established

by a judicial decree. With the advantage which may accrue to him from this procedure, he also necessarily and voluntarily assumes the burden of an affirmative rather than a defensive action. The burden of proof is upon him throughout the action to show that he has a title free from encumbrances. This burden he temporarily meets when he shows a good record title. The respondents in asserting rights by prescription assume the burden, not of proof, but of meeting the petitioner's case. In order to do this they must throw in a sufficient counter-weight to balance the scales. Mere proof of user without more is not enough. In some of the old cases it is stated that there is a presumption from mere user sufficient to show prescription; but that is not the doctrine of the modern cases. *Curtis Mfg. Co. v. Worcester*, Land Court Decisions, p. 112, *ante*, and cases there cited. In old times occupation and user was literally always open and adverse. As the country has filled up and grown and business conditions changed, the adverse character of occupation has grown even more emphasized; but that of user, on the contrary, tends in the other direction; to peace rather than war between neighboring owners; to license rather than adverse use. The respondent does not meet the petitioner's clear record title without showing such user as is, at least, inconsistent with the petitioner's record title. If he does this, the burden of proof still rests on the petitioner. So as to the record title itself, the burden is not upon the respondents to prove the particulars of their right to abut a dam, but upon the petitioner to show that his title is clear of any right to abut a dam.

JOHN V. McCARTHY, PETITIONER.

Middlesex, June, 1905.

Trustee — Bond — Necessity Therefor Under the Various Revisions of the Statutes.

Title in this case is held under a deed given in 1888 by one Colony as trustee, appointed by the probate court in 1878 under a written instrument, in place of a prior trustee who had deceased. Colony gave no bond.

Had he been appointed under the provisions of the Public Statutes of 1882, "every trustee appointed by a probate court shall give to the judge of said court a bond similar to that required of trustees under wills," and "every trustee who neglects to so give bond shall be considered to have resigned the trust," (P. S., c. 141, sec. 13, 18) the deed in question would have been void. The statutes in force in 1878, however, required from a trustee appointed by the probate court in place of a predecessor under an instrument other than a will such bond only "as the court may require." The court had authority to require a bond, and on failure to comply with an order therefor a trustee might be removed; but until such order and removal the examiner thinks no bond was necessary except for a trustee under a will.

The provisions of the Revised Statutes as to the appointment and qualification of trustees, referred solely to trustees appointed under wills. R. S., Chap. 69. And see note of the Commissioners to G. S., Chap. 100. In 1843 the provisions of Sections 7 and 8 of Chapter 69 of the Revised

Statutes (as to the removal and appointment of trustees under wills) were extended to all trusts created by deed. Nothing was said about bonds, however, and the provisions of the Revised Statutes in regard thereto applied only to trustees appointed under wills. In 1852, (Chapter 212) the probate court was given jurisdiction to remove such trustees and appoint new ones, a new trustee giving the like bond and securities required, if any, by the instrument creating the trust estate. Under the General Statutes (Chap. 100, sec. 9) it was provided that trustees appointed under instruments other than wills should "give the bonds and security required."

In 1869 an Act was passed (Chapter 357) providing that trustees "in all cases not otherwise provided for by law shall be required to give bond in the manner provided for trustees under a will or written instrument;" and this was the statute in effect at the time of Colony's appointment in 1878. At this time (by Chap. 331 of the Acts of 1869) the jurisdiction of the probate court had been extended to all matters relating to the sale of trust estates. The probate court had also jurisdiction for the appointment of trustees in various special cases; as, for damages to an estate held for life with a remainder or reversion over, caused by the laying out of ways (P. S., Ch. 49); to hold the excess over \$10,000 on waiver by a widow of her husband's will (Acts of 1861, Ch. 164); on sale of an estate subject to contingent remainder, etc., (Acts of 1868, Ch. 287); to sell timber land and hold the proceeds in case of tenancy for life or in dower, (Acts of 1869, Ch. 249); for sale of estate held in trust for a minor, etc., (Acts of 1869, Ch. 331) and perhaps in other matters.

It would seem that Chapter 357 of the Acts of 1869 was intended to provide that in all matters where there was no express provision as to the bond of a trustee appointed by the probate court, bond should be given in the manner pro-

vided either for trustees under a will or for trustees under a written instrument. No bond is necessary to a trustee at all except as expressly required by statute, and a provision as to bonds in one case will limit rather than extend the requirement beyond the case immediately provided for. *Lowell, et al., Appellants*, 22 Pick. 215. *Drury v. Natick*, 10 Allen 169, 176. *Parker v. Sears*, 117 Mass. 513, 522. *Bradstreet v. Butterfield*, 129 Mass. 339. *Bradstreet v. Butterfield* was the case of a trustee appointed under a will by the Supreme Judicial Court. The provisions of the statute as to the appointment of a new trustee under a will required a bond when the trustee was appointed by the Probate Court. There was no express statutory provision requiring the giving of a bond by a trustee appointed by the Supreme Court, and it was held that "no bond being required of the trustees appointed by the Supreme Court either by the terms of the will or by the provisions of the statute, or by the decree appointing him, his omission to give bond for the performance of his trust does not impair the validity of his conveyance under which the tenants derive their title."

Until the enactment of the Public Statutes there seems to have been a marked distinction in the requirements as to bonds between trustees appointed by the Probate Court under a will, and all trustees otherwise appointed. In the first case the statutes expressly required the giving of a bond, and if the bond was not given, the trustee must "be considered as having declined the trust." R. S., Chap. 69, sec. 1, 4; G. S. Chap. 100, sec. 1, 4. But in the case of a trustee appointed under a will by the Supreme Court, or appointed under a written instrument other than a will by the Probate Court, there was no statutory requirement that a bond must be given, prior to the passage of the Public Statutes. And under the Public Statutes, no trustee who had not been required to give bond by the laws in force at

the time of his appointment was thereafter required to do so except by special order of Court.

The deed from Colony must be deemed to be a valid deed.

Decree for the petitioner.

FRANCIS C. WELCH ET AL. v. THOMAS O. McEN-
ANY, ET AL.

Suffolk, June, 1905.

Easement — Prescription — Non-apparent User — Actual Knowledge.

This is a petition for registration of title to a tract of land on Dudley street in Boston. The single question in the case is whether a right to maintain a drain across locus and thence over land of McEnany east to Hampden street has been acquired by prescription in favor of the estate of Davis and others to the west, as against both locus and the McEnany estate, and in favor of both the Davis estate and that of the petitioner over the estate of said McEnany. This drain was built prior to 1867 and at a time when both locus and the McEnany estate consisted of open, unoccupied land. There is no evidence that the owners of the alleged servient tenements had any actual knowledge of the drain. The drain is a deep drain, and there is nothing on the ground to indicate its existence beyond the fact that the houses on each of the several estates drain into it. I find as a fact that there was no actual knowledge on the part of the owners of either the petitioner or the McEnany estates that the drain extended west of their own premises, or was used by any estate above them.

It has been assumed by both sides that this case turns on the old and much discussed English case of *Pyer v. Carter*, 1 H. & N. 916, and the respondents, Davis et al, argue that that case has not been disapproved either here or in England.

It is to be noted, however, that the case at bar is one of

prescription, while *Pyer v. Carter* was a case of easement by implied reservation; also that, as pointed out by Professor Washburn, there were two principles involved in *Pyer v. Carter* in the phrase "such as it is" upon which that case is made to turn. By "such as it is" the court not only meant that the purchaser took the estate in the physical condition in which it then was, regardless of whether an easement similar to the one claimed could be secured for it at reasonable trouble and expense, but also that he took it as it actually was, regardless of whether the easement was apparent or within the actual knowledge of the owner of the alleged servient tenement, or not. As to the first of these principles, Professor Washburn thinks that the case has not been disapproved in the later English cases and in several of the states in this country; and he also thinks that that principle is right and that the Massachusetts doctrine to the contrary is wrong as a general principle of law. That the law in Massachusetts is to the contrary, however, he expressly points out, and there seems to be no doubt about the matter. *Carbrey v. Willis*, 7 Allen 364; *Randall v. McLaughlin*, 10 Allen 366; Washburn on Easements, Chap. 1, Sec. 3, ¶ 25a *et seq.* The Massachusetts cases which discuss *Pyer v. Carter* are themselves in some confusion as to whether in Massachusetts an easement will be presumed to be reserved when reasonably necessary to the enjoyment of the alleged dominant estate, or only when strictly necessary therefor, but this is immaterial to the present issue, the latter cases being even more opposed to *Pyer v. Carter* than the former. *Buss v. Dyer*, 125 Mass. 287; *Bass v. Edwards*, 126 Mass. 445; *Johnson v. Knapp*, 150 Mass. 267.

On the second principle involved in *Pyer v. Carter*, however, even Professor Washburn is of the opinion that that case has been fully disapproved and that it is wrong in principle, namely: that the easement need not be either apparent

or within the actual knowledge of the owner of the alleged servient tenement. The whole trend of the Massachusetts cases and actual practice in conveyancing is more and more toward reliance upon the record title, except in so far as a right has already been obtained by prescription, in which case it must, of course, pass as appurtenant thereafter regardless of the record. Prior to that time, however, user cannot be deemed to be open and adverse, of which the owner of the servient estate not only has no actual knowledge, but no means of knowledge. *Johnson v. Knapp, supra*. (Note:— And see *Gray v. Cambridge*, 189 Mass. 405, at 418.) I rule that no easement of drainage has been acquired either by or against the petitioner estate.

Decree accordingly.

C. G. Smith for petitioner.

R. G. McKelleget, J. C. Pelletier, C. A. McDonough for respondents.

KATIE M. MASON, PETITIONER.

Norfolk, July, 1905.

Magistrate — Disinterested Party — Mortgage — Attorney to Foreclose May Take Oath of Witnesses to Entry.

Title in this case rests on a foreclosure of mortgage by entry, made in 1901 by an agent of the mortgagee acting under a power of attorney therefor. The certificate of entry recorded in the registry of deeds under the provisions of Public Statutes Chap. 181, Sec. 2, was sworn to by the witnesses before the same person acting as a magistrate who had just previously made the entry in question as attorney for the mortgagee.

That such a certificate cannot be sworn to before the mortgagee himself is well established. *Judd v. Tryon*, 131 Mass. 345. It is contended by the petitioner, however, that the present case does not come within the principle of *Judd v. Tryon*. That case is based squarely upon the obvious injustice of permitting a magistrate to act in a matter in which he himself is the party directly in interest. There is no objection in this state to permitting an attorney to act as magistrate for the purpose of taking either an acknowledgement or a jurat in the course of proceedings which he is conducting for a client. On the contrary the advisability of this is well recognized. *McDonald v. Willis*, 143 Mass. 452. In cases like *McDonald v. Willis*, however, the magistrate certifies to the action of a person other than himself, and as to such matters he is not disqualified as being a party in interest simply by reason of his employment as counsel in the cause. A suggestion is made by the Examiner in this

case that the proper line of distinction to be drawn is at matters in which the attorney personally takes part, but it seems to us that the true criterion is rather that of interest.

In the present case the counsel for the mortgagee had a written power of attorney to make the entry. He acted under the power and the entry was made. Prior to the Revised Statutes nothing further was necessary. Prior to 1875 the presence of witnesses was not necessary. Under the present statute an entry is invalid unless a certificate under oath of two competent witnesses is made and recorded in the registry of deeds within thirty days after the entry. In taking such oath the attorney is no more a party in interest in the matter than is an attorney in any other case in which he takes a jurat. Usually an oath thus taken is the oath of the magistrate's own client, in the present case the oath is that of two disinterested witnesses. Moreover "in administering an oath to the witnesses who have made a certificate of entry upon land for breach of the condition of a mortgage, there is nothing in the nature of a judicial proceeding." *Murphy v. Murphy*, 145 Mass. 224.

While I find no decision covering this particular situation, I am satisfied on the whole that the entry was good, the oath properly administered, and the foreclosure valid. The owners of the alleged equity of redemption have been cited, and have had actual notice of these proceedings. There must be a decree for the petitioner.

So ordered.

DEACONS OF FIRST UNIVERSALIST CHURCH
OF NORTH ADAMS, PETITIONER.

Berkshire, August, 1905.

Condition and Conditional Limitation — Limitation Void — Qualified Fee and Fee Absolute — Grant to Church — Charitable Trust — Private and Public Charities — Power to Alienate.

In this case there is a deed to the Deacons of the First Universalist Church of North Adams as a body corporate under the statute of pious donations, in fee, "subject to the following conditions, namely:" that no encumbrances or liens shall be placed upon the property; that it shall be kept insured; "that they shall not alienate said property, but shall hold same perpetually to the use, benefit and enjoyment of said church;" that buildings shall be kept in repair; and that religious worship shall be maintained by the church or some other society associated therewith according to the usages of the Universalist denomination, and the conveyance is made "upon the further express condition that on the breach of any of the foregoing conditions, all the right, title and interest of the aforesaid grantees shall terminate and the said grantees shall be divested and the same shall become vested in the legal heirs of the grantor."

The grantor subsequently died testate, leaving his wife as his residuary devisee. She has subsequently deceased, and her heirs have been cited and a guardian ad litem appointed to represent their interest. No breach of any of the covenants has yet occurred.

It is argued that this is not a deed upon a common law

condition, because there is no right of reverter in the grantor, but that it is a conditional limitation to a class other than that which would be entitled to the right of reverter under a condition, namely: to the heirs of the grantor and not to the heirs of the grantor's residuary devisee. *Brattle Square Church v. Grant*, 3 Gray, 142. Treating the deed as one upon a conditional limitation, it is then argued that the limitation over is void both as constituting on the whole a simple restraint against alienation, and also as coming under the rule against perpetuities.

On rejecting the limitation over, however, the petitioner further urges that there is left in them an absolute estate, and not merely a base fee with a right of reverter in the heirs of the grantor as in the earlier *Boland* deed to this same church. *First Universalist Church v. Boland*, 155 Mass. 171. In the *Boland* deed the grant itself, after the rejection of the limitation over, was a grant of a qualified fee only and not of a fee absolute. The technical words apt and necessary for the creation of a base fee were used in the grant. In the case at bar the grant in itself is a grant in fee. No case has been cited by the respondent heirs of the grantor, nor do I find any, in which a base fee has been created by the use of such phraseology as "provided that" or "upon condition." Such a phrase as "so long as" or "until" seems to be essential to such an estate. The distinction is a radical one. The only thing conditional in the limitation upon a base fee, is the contingency of the happening of the certain event which fixes the limitation of the estate. It is an estate upon a "natural limitation" as Professor Reeves calls it, one that has a natural end. Reeves, *Real Property*, Section 429. Such an estate may be for a term of years, or life, or in fee. Except for the event which defines its limit, and until defeased by reason of reaching that limit, it is however a definite and full estate. There seems to me to be a clear distinction between the phraseology

which is apt to create a definite estate to endure until the happening of an event upon which it is to determine, and expressions which create an estate that is in its nature always contingent, uncertain and conditional.

Professor Gray seems to have overlooked this distinction when he declares that the two cases of *Brattle Sq. Church v. Grant* and *First Church v. Boland* cannot be differentiated, that there is no possibility of reverter in the one case if not in the other, and that the former is still law, while the latter (inferentially) is not. Gray on *Perpetuities*, 2nd ed., Sec. 40. With great deference to Professor Gray it seems to me that the difference here pointed out constitutes not only the distinction between the *Boland* case and that of the *Brattle Square Church*, but between the *Boland* case and the one now at bar. In the *Boland* case there was a reverter because the estate was a purely limited estate, a base fee, an estate "so long as," and so long only as, it was used in the manner prescribed. When it reached its natural end, (the gift over being void) there was reverter to the grantor. In the *Brattle Square Church* case and in the case at bar, the estate although on condition, was nevertheless, except for the condition, a fee absolute, and the limitation over being void and the force of the condition thereby failing, nothing but the fee simple remained. *Wells v. Heath*, 10 Gray 17, 26.

As to the question whether the property under this deed is held strictly in trust, it does not seem to me that the recent case of *Osgood v. Rogers*, 186 Mass. 238 can be construed, or can have been intended, to go to that extent. The language in that case, that a gift to the deacons of a church as trustees and their successors forever for the support of the church creates a public charitable trust, can hardly have been intended to go to the extent now suggested, that in every such instance qualification as trustee and license of court to sell the trust estate, will be necessary.

The petitioner argues that the word "generally" used

by the Court in the opinion in *Osgood v. Rogers* means "usually;" that the dictum and the decisions therein cited are to the point that simple gifts to a religious society may be charitable trusts, not that of necessity they must be charitable trusts. The petitioner contends that the cases draw a marked distinction between gifts where the sole purpose is to benefit a particular church or society, and where the purpose is for general charitable or moral or religious purposes, though to be effected through the particular organization selected. Where the grantee or devisee is itself the sole and ultimate object of the donor's bounty, and not merely a conduit or means to a general public benefit, then the gift is clearly a private rather than a public charity. "Gifts for the erection of a house for public worship or for the use of the ministry, may constitute a public charity if there is no definite body for whose use the gift was intended capable of receiving, holding and using it in the manner intended. To give it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons. *Going v. Emery*, 16 Pick. 107, 119. *Perry on Trusts*, 710. *Saltonstall v. Sanders*, 11 Allen, 446. But when there is a body or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone. *Attorney General v. Federal Street Meetinghouse*, 3 Gray, 1, 49. *Parker v. May*, 5 Cush. 336. Property devoted to the support and maintenance of public worship, which is public only in the sense that it is open to the public by courtesy, in accordance with the usual practice of all churches in this Commonwealth, does not thereby become a public charity." *Old South Society v. Crocker*, 119 Mass. 1, 22. The greater part of this citation from the

decision in *Old South Society v. Crocker* was quoted with approval by the Court in *Attorney General v. Clark*, 167 Mass. 201, and the Court there added "these principles are decisive of the present case." In *Warner v. Bowdoin Square Baptist Society*, 148 Mass. 400, the Court says "in whatever sense and to whatever extent the Bowdoin Square Baptist Society is charged with a duty to apply its property for purposes of public worship, public worship is a parish purpose and not a church purpose."

Of course gifts to religious societies may be charged with charitable trusts; but "in all the cases of charitable uses, or nearly all, the persons ultimately to be benefited by the donations are uncertain," or are persons other than the trustee body and those immediately affiliated with it. *Going v. Emery*, 16 Pick. 107, 119. *McAllister v. Burgess*, 161 Mass., 269. *Bartlett petitioner*, 163 Mass. 509. *Minns v. Billings*, 183 Mass. 126.

"But it was urged in argument that it is usual in all Christian societies and places of public worship, that all persons who choose may in fact attend, and that it is usual to set apart free seats, and so the public are benefited. The fact is undoubtedly so, that persons who desire it may usually attend; but it is matter of courtesy, and not of right. On the contrary, any religious society unless formed under some unusual terms, may withhold this courtesy, and close their doors, or admit whom they please only; and circumstances may be easily imagined in which it would be necessary to their peace and order that they should exercise such right. Were it otherwise, and were the occasional permission of all persons to enter churches, and listen to preachers, to be regarded as a public or general right, every parish, territorial or poll, every society formed by the incorporation of proprietors or pewholders must be considered as a public charitable institution to be regulated and controlled by an information filed by the attorney general at the relation of any

person desirous of attending the religious services of such societies." *Attorney General v. Federal Street Meeting-house*, 3 Gray, 1, 50. "In looking at the church and the deacons together as one aggregate body, it appears, that the church holds its property as corporate property is held, not in trust, but in its own right, to be appropriated to the uses and purposes for which such aggregate body is constituted." *Parker v. May*, 5 Cush. 336, 348.

To interpret *Osgood v. Rogers* as suggested by the Examiner would be to render every church title in the language of Professor Gray "a perpetual trust in which case the plaintiff (church) without the aid of the Court could not make a good title." This would tend to unsettle many valuable titles, and would seem to be contrary not only to long established custom but to the spirit at least of the statute. In the case at bar the grant is by its terms to the Deacons "as a body corporate," which brings them necessarily and directly within the provisions of the statute of donations and conveyances for pious uses. The alienability of lands so held is regulated by section 6 of that act. Rev. Laws, chap. 37, sec. 1 and 6.

The solution of the difficulty seems to me to be found in the distinction pointed out in *Attorney General v. Merrimac Mfg. Co.* between such a public charity as requires an information in the name of the Attorney General for its enforcement, and such a trust for religious purposes as a Court of equity will if necessary take cognizance of. "Public worship may mean the worship of God conducted and observed under public authority; or it may mean worship in an open or public place, without privacy or concealment; or it may mean the performance of religious exercises under a provision for an equal right in the whole public to participate in its benefits; or it may be used in contradistinction to worship in the family, or the closet. In this country, what is called public worship is commonly conducted by voluntary

societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious services such persons, and upon such terms, and subject to such regulations, as they may choose to designate and establish. A church absolutely belonging to the public, and in which all persons without restriction have equal rights, such as the public enjoy in highways or public landings, is certainly a very rare institution, if such a thing can be found. But in the absence of any contract or gift, (and a gift is strictly a contract), by which the legal or equitable estate of the owner of the fee of the land is itself diminished, it has certainly never been held in this Commonwealth, and we do not know that it was ever suggested, that the power of disposing of the property, or of changing the use to which it should be applied, did not remain as absolute and unquestioned as in the case of any other real property. We know no rule of law which would prevent the sale of any church by its owner, and the use of the proceeds for any purpose to which that owner might lawfully appropriate money, merely because it is a church, if the title is subject to no trust, and is unincumbered. We suppose that churches of all denominations have been, certainly they may have been, sold by their owners, notwithstanding their consecration or dedication to religious uses. The consecration is, and is to be regarded as, a religious ceremony, and not as an act qualifying the estate in the land. But on the other hand donations, grants and devises have been sustained and executed by courts of equity as appropriations to pious and charitable uses, where the element of public right or interest could hardly be found; such as for a church, or the support of a pastor or teacher, of a particular and perhaps a very small denomination; or for the benefit of a particular district or territory; or of persons connected with a designated institution; or of a particular employment, age, sex, color, descent or nation.

It would seem, indeed, that there must be some strictly public object of bounty, or such indefiniteness in the designation of those who are beneficially interested, that no persons competent to sue can claim a direct interest in themselves, to authorize a proceeding by information in the name of the attorney general to enforce the due administration of the charity. But the dedication or appropriation to pious and charitable uses may be complete, so that the use will be established and the trust enforced by a court of equity, where the object is not a distinctively public one." *Atty. Gen. v. Merrimac Mfg. Co.*, 14 Gray 586, 602.

If the church organization should ever cease to exist and the church and society vote to discontinue religious worship and make proper disposition of their property, as in *Osgood v. Rogers*, equity would doubtless intervene on the ground of a public charitable trust as in that case, and it is in such a view of the case that the language of that decision is to be interpreted. No more specific trust, however, need be set forth in the decree here than is necessarily imported in the title itself of the petitioning religious corporation with the duties and incidents implied thereby.

There may be a decree for registration of title in the petitioner corporation in fee simple.

So ordered.

C. H. Wright, C. A. Parker for petitioner.

E. D. Getman, E. N. Carpenter, E. L. Bates, E. C. Burbank for respondents.

Note: But see *Sears v. Attorney General*, 193 Mass. 551, ad fin., sustaining *Osgood v. Rogers* as directly overruling *Parker v. May* and *Old South Society v. Crocker*. Quaere: How far *Sears v. Atty. Gen.* affects the decision in this case.

CANNABIS MFG. CO. v. TUCKER ET AL.

Suffolk, January, 1906.

Deed — Boundary on Creek — Monuments at Side of Stream — Plan — Partition.

The question in controversy in this case is as to the title to so much of the premises claimed by the petitioner, containing about 6,000 square feet near the middle thereof, as originally lay within the southerly half of the bed of Salt Creek, which formerly flowed through the property. The centre line of this creek formed the boundary line between Roxbury and Boston. The creek appears from the records to have been filled up somewhere between 1872 and 1883. No evidence as to the circumstances under which this was done was introduced, or any evidence outside the record, but the parties rest on the proper construction to be given to the deeds.

Title to the Roxbury portion of the property was in one Edward Sumner of Roxbury, who died in 1829 intestate, as a part of the "Dudley marsh" purchased by him from Thomas Dudley in 1786, and bounding northerly by the centre of Salt Creek. The Dudley marsh was set off to his widow as a portion of her dower, and in 1855 partition was had of the dower land among the Sumner heirs in partition proceedings in the Probate Court for Norfolk County. Among the lots described in the petition for partition was "about four acres of salt marsh in Roxbury, bounded East by Salt Creek; North on heirs of Joseph Warren; South on William Dudley; and West on heirs of Nathaniel Ruggles."

Commissioners were appointed, and as a part of their report they set off and assigned to certain heirs (under whom both petitioner and respondents claim title) several parcels including, "Also lot 7 on said plan of Marsh land (plan of Marsh land belonging to heirs of Edward Sumner made by Garbett & Woods, dated Nov. 1, 1855) bounded southeast by lot 6 on said plan 560 feet; southwest by lot 8 on said plan 42.60 feet; northwest by land of persons unknown to commissioners 391 feet; and again northwest and north by the water line on said plan 177 feet, containing 31,270 feet, together with the right of way over the whole of lot 8," and to a certain other heir, one Jane Haines (under whom both petitioner and respondents also claim) they assigned and set off "lot 6 on said plan of marsh land, bounded, southeast by lot 5, 577 feet; southwest by lot 8, 21 feet; northwest by lot 7, 560 feet; and northeast by the water line on said plan about 39 feet; containing 15,635 square feet."

With the papers in the partition proceedings is a "plan of piece of Marsh in Roxbury belonging to the Heirs of Edward Sumner" by Wm. A. Garbett, Surveyor, dated Nov. 1, 1855, which is the plan referred to by the commissioners. This plan shows the marsh divided into seven lots. It shows the centre line of the creek, labelled "Roxbury and Boston Line" and also the southerly side or water line of the creek. The side lines of the lots run to the water line of the creek, and the distances and areas are computed to the water line only.

The lots so assigned were later conveyed by the respective heirs by deeds using the same description, and the title so conveyed is now vested in the petitioner who claims title thereunder to the centre line of the creek. The respondents are the present representatives of the Sumner heirs, and claim that title passed under the partition proceedings to the water line only of the creek, that the fee in the southerly half of the creek remained unpartitioned and undivided in

the heirs of Edward Sumner, and is now vested, not in the petitioner, but in them.

There seems to be no case exactly in point. The petitioner relies on *Clark v. Parker*. The respondents reply that in that case the lots were described as bounding "on" the way in controversy, and that that was quite sufficient in itself to the decision that the fee therefore carried to the centre. In the case at bar the description, the measurements, the areas and the lines on the plan all stop at the water line and exclude the fee in the creek. The point is a fair one. Nevertheless the opinion in *Clark v. Parker* rests, not on that fact, but on the fact that it was the duty, and the sole duty, of the commissioners to make partition of the entire estate. *Clark v. Parker*, 106 Mass. 554. See also *Miller v. Miller*, 13 Pick. 237. The case of *Morgan v. Moore* on which the respondents rely was a case of voluntary partition among heirs by deeds of mutual release, and the decision rests squarely on the ground that as to the way on which the several lots abutted there was "not only no occasion for its division, but a manifest necessity for retaining it in common." *Morgan v. Moore*, 3 Gray 319. The necessity for retaining in common half the bed of a creek, cut off from access, unsalable and unusable except in connection with the several lots, does not appear. Nor aside from the matter of partition does it seem to me that it should be excluded from a grant simply for the reason that the description in bounding the property runs by monuments established in the only place where they could be put, viz., on the bank of the stream. Whether the rule laid down by Judge Gray and reaffirmed in some of the latest decisions be followed, that where a natural monument that has width is used as a boundary, the boundary line shall be by the centre of it, or the grant be construed according to the doctrine of Judge Holmes that the whole thing is a mere matter of intention and the intention in the absence of definite evidence to the contrary must be presumed to be by the

middle line of a way or stream, in either case it would seem that so far at least as a stream is concerned the mere use of monuments situated on the bank, or of the bank itself, for the purpose of measurements or description will not alone be sufficient to exclude the fee in the adjoining bed of the stream. *Boston v. Richardson*, 13 Allen 146; *Dean v. Lowell*, 135 Mass. 55; *Crocker v. Cotting*, 166 Mass. 183; *McKenzie v. Gleason*, 184 Mass. 452.

The monuments are usually established, and the line between them usually plotted, for the purpose of determining, not the line of the street or creek, but the boundary lines of the adjoining properties, which can best be shown, located or determined by using such monuments as termini to or from which measurements may be made. It seems to be against the trend of modern decisions to continue to construe such descriptions as showing an intent to exclude the natural, adjacent half of the fee in the adjoining stream or way. So far as the use of fixed monuments on the side of a street or way is concerned however, such appears to still be the law in this state. *Bowers v. Selew*, Land Court Decisions, p. 141, *ante*, and cases there cited. Perhaps the Supreme Court may at some future time modify this doctrine as to streets in accordance with a general line of development that has been more or less apparent in Massachusetts and very pronounced in some of the western states.

So far as streams are concerned, however, the reasons for using monuments situated on the bank are so imperative, the difficulty of using or even locating lines in the bed of the stream so obvious, and both the intent and the advisability of conveying title to the centre line so natural and so apparent, that no other intent seems ever to have been presumed. The early cases are reviewed in *Cold Spring Iron Works v. Tolland*, 9 Cush. 492, and the rule is there stated that wherever a grant is so framed as to touch the waters of a river and the parties do not expressly exclude the river,

one-half of the bed of the river is included by construction of law. "If the parties mean to exclude it they should do so by express exception." As to public boundaries there is no doubt about the matter. "Where a stream constitutes" (as did the creek in the case at bar) "the boundary between two nations, states or towns, each holds to the middle of the stream." *Flynn v. Boston*, 153 Mass. 372. There is no reason for any difference as to private grants. "It is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way." *Dodd v. Witt*, 139 Mass. 63, 65.

In the present case I think that the water line was shown on the plan, and that the measurements were taken to it, merely because that was the natural and only practical method for the surveyor to use at that time, and that those facts alone are not sufficient to rebut the presumption that title was intended to extend, both in the partition proceedings and the subsequent deeds, to the centre of the creek.

Decree accordingly.

W. A. Webster for petitioners.

H. M. Aldrich, A. M. Lyman for respondents.

CUDAHY PACKING CO. v. FAIRBANKS CANNING
CO. ET AL.

Bristol, February, 1906.

*Land Registration — Practice — Easements, Determination
and Enforcement — Equity.*

This case raises an often recurring question in regard to the jurisdiction of this court as to the regulation and control of the mode of user of easements.

The Merchants Manufacturing Co., owning a large tract of land in Fall River suitable for manufacturing and business purposes, laid out a strip for a spur railroad track through it, divided it into lots, and in 1900 began to sell the lots to the various parties to this suit, together with a common right to use said strip and track subject to certain conditions and regulations as to the mode of user, and the payment of certain compensation to be apportioned according to the amount of user by the respective parties. The petitioner having applied for registration of title to the land purchased by it of the said Merchants Co., and some questions and disputes having arisen as to the rights of the several parties purchasing from said Merchants Co. to use said track as now constructed, and other portions which may under the terms of said deeds be constructed, and also as to the amount of compensation properly payable for such use, it has been contended that these matters can and should be determined in these proceedings.

The land registration act however is an act which looks solely to the determination of the status of the title to a given tract of land. The land court has full power both at law

and in equity as to all questions that may arise in determining that matter, but there its jurisdiction ends. Its decrees are decrees in rem. The sole matter before it is the land, its title, its location on the ground, and an official declaration of the vested rights of any persons therein. In what manner the rights so determined shall be exercised, controlled or protected, is not a matter as to which this court has jurisdiction or machinery adapted either to its determination or enforcement. So with its miscellaneous jurisdiction. Suits and proceedings having to do with the determination of the title to land have been transferred to this court, but all matters of equity have been excluded. Suits to quiet title under Revised Laws, Chapter 182, have been transferred to the land court, but bills in equity under the same chapter of the statutes have not. Nor does it seem to be a hardship, but rather an advantage, that the jurisdiction should be thus divided. It is a difficult and often an impracticable matter in a common law, equitable or ordinary statutory proceeding to determine the exact status of a title, while the peculiar machinery of this court is speedy and expressly adapted to that end. On the other hand the enforcement of rights and remedies in equity and in personam is neither within the proper province nor procedure of a purely technical court. I rule that neither the identity of the persons and corporations now maintaining rails or spur tracks on said strip, nor the amount of the compensation demanded or paid for the use of such rails or spur track is material or properly in issue in this proceeding, or should appear in the decree for registration of title. There may be registered, however, as appurtenant to the petitioner's estate a right of way over a portion of said eleven foot strip of land as established and described in the deed from the Merchants Manufacturing Co. to the petitioner, said right of way to be used in common with all others entitled thereto, subject to the restrictions, conditions, reservations, and agree-

ments as set forth in said deed, and in the deed from the Merchants Manufacturing Co. to the Fairbanks Canning Co.

Decree accordingly.

A. S. Phillips for petitioner.

J. W. Cummings, Jennings, Morton & Brayton for respondents.

LYDIA G. BROWN v. TOWN OF SUDBURY.

Middlesex, June, 1906.

Colonial Grants — Land Tenure Under Colony and Province Laws — Common Lands — Towns and Proprietors — Proprietors of Common Lands and Proprietors of General Fields — Reservation and Exception.

This is a petition under Revised Laws, Chapter 182, Section 11, to determine the validity of an alleged reservation in a grant of a portion of the Lowance meadows in Sudbury by the Proprietors of the Common and Undivided Lands in Sudbury to one Pitts, dated December 6, 1715, in the following language: "Only the proprietors reserve forever convenient driftways to the above said Lowance meadows and gravel to mend the mill dam and the highways, as there shall be occasion."

The petitioner claims that the title to the Lowance meadows at the date of the above grant was in the Proprietors of Common and Undivided Lands as incorporated tenants in common; and that the language above quoted created a technical reservation which has now expired, either (a) because it was a reservation to tenants in common without the use of words of inheritance, or (b) because it was a reservation to a corporation which has now become extinct. The respondents assert (a) that the language in question recited or created an exception, in which case this court has no jurisdiction of the matter in this particular proceeding, or (b) that if it was a reservation it was a reservation which inured to the benefit of the inhabitants of the town, or (c) that in whatever form it arose the right has been

acquired by the town by user to take gravel from the land in question for mending the roads.

On November 20, 1637, the General Court of Massachusetts Bay Colony resolved, on a petition from "a great part of the chief inhabitants of Watertown" that for want of meadow they might have leave to remove and settle their plantation upon the river which runs to Concord, that the petition be granted; and that Lt. Willard with four others should view the places on the river and set out a place there by marks and bounds sufficient for fifty or sixty families. And it was further ordered that after the place was set out, the petitioners "or any such other freemen as shall join them" should have the power to order the situation of the town and the proportioning of lots, and "all other liberties as other towns have;" and, finally, that "the said persons appointed to set out the said plantation are directed so to set out the same that there may be 1500 acres of meadow allowed to it, if it be there to be had, for the use of the town." Colony Records, Vol. I, (*) Page 207. At a General Court on September 6, 1638, it was resolved in regard to this undertaking that "the petitioners Mr. Pendleton, Mr. Noyes, Mr. Brown and Compa, are allowed to go on in their plantation and such as are associated with them." Colony Records, Vol. I, * Page 229. On September 4, 1639, at a General Court it was ordered that "the new plantation by Concord shall be called Sudbury," and that upon the petition of the inhabitants of Sudbury, Peter Noyes and other persons named "have permission to lay out lands to the present inhabitants." Colony Records, Vol. I, * Page 259.

In the original settlement of the Massachusetts Bay Colony two kinds of land tenure are to be found, the individual and the communal. On the one side were the individual adventurers pushing forward to the frontier in individual holdings, and on the other, caused by the necessity of having

some common base for supplies, communication and protection, were the small settlements where the holdings were partly individual and partly common. This community interest was one of necessity only, and seldom extended beyond the necessity from which it arose. The underlying spirit of the enterprise was that of individual action, individual liberty and individual ownership. The grants to individuals were from the beginning grants in fee. *Feoffees of Ipswich v. Andrews*, 8 Met. 584; Colony Records, Vol. I, * 21; Colony Records, Vol. V, * 472. Grants to individuals, of territory to be developed as an individual holding as distinguished from a projected town settlement, were grants to them in fee as tenants in common. *Higbee v. Rice*, 5 Mass. 343. Where grants were made for the purpose of starting a new settlement, like this of Sudbury, the grants were usually (like a modern special charter) to certain named individuals, and to such others as should within given conditions join them in their enterprise. Where grants were made for the further enlargement of an already existing settlement, the grant generally ran to the town. See *Atty. Gen. v. Tarr*, 148 Mass. 311.

In the early days of the Colony the inhabitants of a town, whether for land owning, church going or strictly municipal purposes, formed practically one organization; but as time went on it became neither necessary nor desirable that all of the inhabitants of the town should have equal privileges in voting, in the common lands, or in the property of the parish. At first all meetings were simply meetings of the inhabitants, and any action taken by the "proprietors," by the "parish," or by the "town" was taken at one and the same meeting. The respondents in this case contend that the "proprietors" was practically the landholding corporate phase of the community, while the "town" was the governing corporate phase of the same community; that the title and ownership of one was practically the title and owner-

ship of the other; and that a reservation to either was a reservation to the inhabitants of the town. While the "inhabitants" and the "proprietors" in the early days were often the same people as a matter of fact, they differed nevertheless very radically as a matter of law. At first, as was to be expected, there was little distinction between them in the statutes, as there was even less distinction between them in fact. In 1643 it was provided that "where the commoners can not agree about the manner of improvement of their field then such persons in the several towns as are deputed to order the prudential affairs thereof, shall order the same, or in case where no such are, then the major part of the freemen." Colony Records, Vol. II * Page 37. But, although alike in their origin, and not only similar but identical in their early management, the two incorporated forms of town life were very dissimilar in their purpose, and in the nature of their legal title to property. The one was a permanent communal corporation, the other a temporary and self-disintegrating body. The one was formed to live, the other was expressly formed to die. Strong, J., in *Monumoi v. Rogers*, 1 Mass. 159, 164. When in 1692 power to manage, divide and dispose of common lands was given to the major part of the "proprietors," the provisions therefor were passed as part of a general act "for regulating of townships, choice of town officers, and setting forth their powers." Province Laws, Act of 1692, Chapter 28. Meantime in 1660 it had been ordered that thereafter "no cottage or dwelling place shall be admitted to the privilege of commonage for wood, timber and herbage, or any other the privileges that lie in common in any town or peculiar, but such as are in being or hereafter shall be erected by the consent of the town." Colony Records, Vol. IV * Page 337. (Note — Some of the towns had passed orders to this effect as early as 1632. See an article by Prof. Beale in the *Green Bag* for June, 1907.) In 1679 towns had been au-

thorized to dispose of their lands by action of a majority of the freemen. Ancient Charters (ed. 1814) Page 195. In 1692 provision was made for the organization of towns and the regulation of the duties of town officials, while the administration of common lands was transferred to the "proprietors." An. Charters (ed. 1814) Page 247. In 1694 the separate corporate character of the proprietors was recognized, and provision was made that both towns and proprietors of common lands might sue and be sued. Province Laws, Acts of 1694, Chapter 15; An. Charters, Page 279. In 1698 provision was made for calling meetings of the proprietors. Province Laws, Acts of 1698, Chapter 12; An. Charters, Page 320.

Thereafter each body held its separate meetings and kept its separate records. Title in each case was a corporate title in so far as each body had certain corporate powers, including those of management, the right to sue, and the power of division and alienation by vote; but in the case of a town the title was that of a fee in the municipal corporation, while in the case of proprietors of common lands the title remained in the several proprietaries as tenants in common, although subject to be divided, lessened or defeased by statutory action of the majority. *Monumoi v. Rogers*, 1 Mass. 159; *Mitchell v. Starbuck*, 10 Mass. 5; *Bott v. Perley*, 11 Mass. 169; *Springfield v. Miller*, 12 Mass. 415; *Worcester v. Eaton*, 13 Mass. 369; *Jeffries Neck Props. v. Ipswich*, 153 Mass. 42. The only case which seems to make to the contrary is that of *Tappan v. Burnham*. At first sight this seems to support the contention of the respondents. In that case on petition of the inhabitants of Salem to have land at Jeffries Creek to erect a village there, there was a grant to certain individuals "and Compa." The court found that this was a grant to a proprietary, having certain corporate powers, which subsequently by usage or express grant became enlarged into full municipal authority. The decision

expressly rests on the authority of *Commonwealth v. Roxbury*. "This was the construction put on a similar vote of the General Court in *Commonwealth v. Roxbury*." But in *Commonwealth v. Roxbury* the grant was a grant to the "town of Roxbury." Neither the distinction between a grant to individual proprietors and a grant to a town direct, nor the distinction between the incorporated proprietors of common lands and the incorporated municipality was in any way considered in *Tappan v. Burnham*. For anything that appears in that case there may have been as in other towns, and indeed as is suggested by the court in its opinion, a transfer of title from the "proprietary having certain corporate powers . . . by express grant . . . to the full municipality." *Tappan v. Burnham*, 8 Allen, 65, 71; *Commonwealth v. Roxbury*, 9 Gray, 451, 496.

The "Proprietors of General Fields" was a different sort of corporation created by Act of February 24, 1786, which provided for the organization of the proprietors of individual lots lying in one common enclosure. Originally the holders of such lots were the same people, living in the common village, holding their properties by the same titles, and governing themselves and all of their affairs at the same meetings, and by the same statutes, as their neighbors in the common life of the community. The ordering of the common fields, like that of the undivided lands, was at first given by one statute to the selectmen. Colony Records, Vol. II, * Page 37. Later the matters of fencing and improving the individual fields maintained within one common enclosure, was made the subject of separate legislation. An. Charters, pages 320, 420, 464, 600, 618; Province Laws: 1698, Chapter 12; 1718, Chapter 3; 1727-28, Chapter 13; (and see 1727, Chapter 9, regulating Proprietors of Common and Undivided Lands); 1753-54, Chapter 29; 1758, Chapter 33. As the common life began to disappear before the individual ownership, provision was also made for the

dissolution of these common enclosures. An. Charters, Page 321; Acts of 1698, Chapter 12 ad fin; *Mansfield v. Hawkes*, 14 Mass. 439. And finally, like the proprietors of pews, and wharves, and other individual owners banded together for certain common purposes, the proprietors of a general field were authorized to form themselves into a modern corporation. Acts of 1785, Chapter 53. But these proprietors of general fields, owning in severalty though in common enclosure, have nothing to do with the Proprietors of Common and Undivided Lands, holding their undivided shares as tenants in common.

As time went on the undivided lands grew less and less in quantity, while the individual inhabitants of the town, either holding in severalty or not holding land at all, increased in number. Thus the purposes, needs, powers and ownership of the proprietors of the common lands became not only distinct, but in some cases adverse, to those of the town. *Jeffries Neck Props. v. Ipswich*, 153 Mass. 43. In most cases the proprietors eventually divided all of their lands, and the corporation died its natural death. In some cases the proprietors conveyed their few remaining rights of property to the town itself. *Commonwealth v. Bailey*, 13 Allen, 541, 543. In at least one case, that of Salisbury, it is claimed that the ancient proprietors organization is still alive and holds title to lands adversely to the claims of the town.

In the case at bar, as in the case of most towns, the proprietors records were kept with those of the town, and to some extent in the same book. The lands of "proprietors" were often disposed of, as a matter of common conveyancing knowledge, at meetings which according to the wording of the records were "town meetings." It is claimed that the same fact obtained in Sudbury. I am unable to sufficiently decipher the old volume of records to judge of the matter, but it is immaterial. There was a period when separate

proprieters meetings were held and separate proprietors records were kept, and during this period the grant in question of December 6, 1715 to Pitts was made. The argument urged by the respondents that this land was town land, and that the reservation was made to the inhabitants, is not supported by the evidence, and cannot be maintained in the face of the Pitts grant. The ancient vote of the proprietors making the grant, is itself *prima facie* evidence of title. *Springfield v. Miller*, 12 Mass. 414; *Gloucester v. Gaffney*, 8 Allen, 11; *Jeffries Neck Props. v. Ipswich*, 153 Mass. 42.

If this was a reservation it was a reservation to the grantor, the proprietors of common lands, and not to the inhabitants, who are the present respondents. The absence of words of inheritance is not material. The original statute of 1651 requiring the use of the word "heirs" in granting a fee, as explained by the Act of 1684, was "intended for the direction of private persons only, in their particular deeds and conveyances of land from one to another." *Colony Records*, Vol. IV * Page 35; *Colony Records*, Vol. V * Page 472. *Commonwealth v. Roxbury*, 9 Gray 451, 466. It did not affect a grant from or to a public body, and in the grant to Pitts the Commoners though holding individually as tenants in common were granting in their corporate capacity, and such also was the reservation to them, if reservation it was.

But was it a reservation? Could it have been so intended by the parties? The alleged reservation was of driftways to the meadow, and gravel for mending the mill-dam and highways. With the two latter matters (and we are concerned only with the last) the Proprietors had nothing to do. The mill site had been already granted by the town (January 7, 1659) to a private individual, though with a provision apparently for the benefit of the inhabitants in general, as to grinding the town's corn. *Sudbury Records*, Vol. I, Page 65. It is claimed by the respondents that the lan-

guage now in question constitutes not a reservation, but an exception. The town authorities had a right by statute to take gravel from any land not planted or inclosed. Acts of 1693, Chapter 6; An. Charters (ed. 1814) Page 267. The respondents argue that this necessarily included the lands in question. This property has contained not only a gravel bank for over fifty years but the only gravel bank available for mending roads in that part of the town. For over fifty years the town authorities have continually taken gravel from it for mending the roads. For over twenty-five years the owner of the mill privilege has taken gravel from it, under a claim of right founded on his title deeds, for mending the mill-dam. So far as a claim by adverse possession is concerned, it has nothing to do with the present proceedings. Such a right, even if it has been acquired by the owner of the mill site, would not be in any way inconsistent, either with the right claimed by the respondent, or with the contention of the petitioner that the provision in question was a now expired reservation. Moreover, the evidence does not tend to establish a right by prescription in the town. *Jeffries Neck Props. v. Ipswich*, 153 Mass. 42-46.

I am of opinion that the provision in question was really an attempted reservation in favor of third parties. Perhaps enough can properly be inferred as to the existing state of affairs in 1715 to equally well warrant the conclusion that the clause should be construed as an exception. Whether it was an exception or an attempted reservation in favor of strangers to the deed, is however immaterial to this case, provided it was not a "reservation." As I construe it, it was not a reservation.

Decree accordingly.

C. H. Sprague, E. W. Crawford for petitioner.

C. Q. Tirrell, F. F. Gerry for respondent.

THEODORE H. RAYMOND, PETITIONER.

Middlesex, June, 1906.

*Will — Devise — Vested Remainder Subject to being De-
vested — Estate Tail — Determinable Fee — Executory
Devise.*

In this case title to the greater part of the land involved comes under the will of one James H. Thayer, late of Cambridge, probated April 26, 1881, wherein it was devised to his wife for life and upon her death to his son Farwell J. Thayer "to have and to hold to him, his heirs and assigns. But if said son shall leave no child or children surviving him, then upon his decease I give and devise the same to my daughter to have and to hold to her, her heirs and assigns."

Various constructions of this will are suggested by the Examiner. The testator's widow is now deceased. The son Farwell J., is living and has a son Farwell E. The daughter, Martha Ann Dillman, survived her father, and then died leaving several children. Both Mrs. Dillman in her life time, and after her death her children, and also Farwell E., the only child of the said Farwell J., have successively deeded all interest in this estate to the said Farwell J., under whom the petitioner now claims title.

The first suggestion is that the devise was a devise in fee simple absolute to Farwell J. Thayer, and that the succeeding phraseology constituted merely an invalid attempt to control its disposition. If this construction is adopted, then title is in the petitioner under his deed from said Farwell J.

In *Hill v. Bacon*, 106 Mass. 578 the testatrix devised to

her husband for life and upon his decease to her children, and if on the death of the husband either of the children had deceased leaving issue, "such issue shall take their parent's portion." The Court held in a five line opinion that the children took a vested remainder in fee simple absolute. This decision has not been followed, however. It was cited in *Kimball v. Tilton*, 118 Mass. 311 where the only question necessary to the decision was whether the interest was a vested one, not whether, though vested, it might not later have become divested, a proposition which the court declined to discuss. The same thing was true in the two cases on which in *Hill v. Bacon* the Court relied for its decision, namely: *Pike v. Stevenson*, 99 Mass. 188, and *White v. Curtis*, 12 Gray, 54. In the only other case in which *Hill v. Bacon* has been cited, it is to the proposition that the remainder while vested in interest is nevertheless subject to be divested in case of death before the life tenant, which is precisely the contrary of what *Hill v. Bacon* actually decided. *Shaw v. Eckley*, 169 Mass. 119, 122. The inconsistency obviously existing between *Hill v. Bacon* and other decisions was clearly presented to the Court by the learned counsel for the appellee in his brief in *Dodd v. Winship*, but the Court made no reference to *Hill v. Bacon* in its opinion, though deciding that in the case then before it a devise at the death of the life tenant "to and among any children, but if any child be then deceased leaving issue," to such issue, constituted a remainder in the children, vested in interest though not in possession, but liable to be divested and defeated by death before the life tenant leaving issue, who would then take as substituted devisees. *Dodd v. Winship*, 144 Mass. 461.

The policy of the law is rather to give some effect to all of the language of the will than to cut any of it out as being repugnant or invalid. The rules for interpretation are rules of construction not rules of substantive law, and the inten-

tion of the testator if it can be gathered will be given effect, even though similar phraseology may have in other cases been given a directly opposite construction. *Goddard v. Whitney*, 140 Mass. 92, 98; *Heard v. Read*, 169 Mass. 216, 223; *Shattuck v. Balcom*, 170 Mass. 245, 251; *Crapo v. Price*, 190 Mass. 317. In the case at bar the testator clearly intended a devise over on the death of Farwell J. "leaving no children surviving him." This is wholly repugnant to the theory of a fee simple absolute in the said Farwell J.

The Examiner's next suggestion is that the will may be construed as a devise to Farwell J. in fee tail. "When by one clause in a will an estate for life or an estate in fee is given by plain words, but it appears in other parts of the will, by express words or by implication, that it was the intent of the testator in such devise that the issue of the devisee should take the estate in succession after him, then the life estate is enlarged in the one case, and the estate in fee is reduced in the other, to an estate tail." *Nightingale v. Burrell*, 15 Pick. 104, 112; See also *Wheatland v. Dodge*, 10 Met. 502; *Gilkie v. Marsh*, 186 Mass. 336; and *Crocker*, Notes on Common Forms pages 470-475, where the cases are fully cited and discussed. If this be construed as a devise of an estate tail, then the entail has been barred and title is in the petitioner. I am of opinion, however, that such a construction cannot be given to the devise. This is not a provision made in case of the devisee dying "without lawful issue" or "without lawful heirs," or "without children" or "leaving no children," which could be construed as "leaving no issue," or fairly import a general failure of issue. Moreover the devisee had a child then living (Farwell E. Thayer) and expressly provided for by the testator in this will. Provision is carefully and expressly limited to the case of Farwell J. leaving no child or children "surviving him." The testator was taking care of his descendants then living and known to him. To construe this as a

fee tail would result in defeating instead of furthering the manifest intent of the testator.

Another suggestion is that of a devise to Farwell J. for life with contingent remainders to such children as may survive him (an as yet unascertained class) and vested remainder thereunder in Martha Dillman. Such a construction would, however, necessitate reading into the will a devise to the children surviving Farwell J. There is no such devise in terms and none even implied otherwise than by inference from the mere fact that if Farwell J. "shall leave no child or children surviving him" the estate shall then upon his decease go to Mrs. Dillman. What the testator really intended by this provision seems to be very clearly illustrated by Chief Justice Shaw in the course of his opinion in *Nightingale v. Burrell*. "The difficulty, therefore, in determining whether a contingent devise is an executory devise or a remainder, usually arises where there is a plain devise in fee in one clause, and afterwards, a gift over upon the contingency of the first devisee dying without issue. If the implication from such description of the contingency taken together is, that in the event described it was the intention and expectation of the testator, that the issue should take in succession, then the fee first created is reduced to an estate tail, the tenant in tail may suffer a recovery and bar all remainders, and the gift over cannot take effect as an executory devise, both because it may take effect as a contingent remainder, and because it might not vest within the time limited for the vesting of the estate under an executory devise. But if properly described, the event of a person's dying without leaving issue surviving or not, is a contingency, upon which an executory devise may be limited over, as well as the happening of any other event. And there may be very good reasons why a testator should select this event, as one, upon the happening of which, or not, the estate should remain absolute in the first devisee, or go over to

some secondary object of the testator's bounty. He may properly consider, that if the devisee, a son for instance, the first object of his bounty, has children, who survive him, he shall have the estate absolutely, to enable him to provide for such children, but leaving it to his discretion, whether he will transmit the estate to them, or make any other disposition of it, as he, such first devisee, may determine. But if such first devisee should leave no children to be provided for, the testator might well determine to adopt his own mode of disposing of the estate, and direct it in that event to vest in some other person. If, therefore, the description of this contingency is such as not to raise any implication, that it is the intent of the testator that the issue are to take the estate as children and heirs of the parent, then the estate limited over is a good executory devise; the first devisee has an estate in fee, determinable upon the happening of the contingency, but otherwise absolute." *Nightingale v. Burrell*, 15 Pick. 104, 112; see also *Richardson v. Noyes*, 2 Mass. 56; *Blanchard v. Blanchard*, 1 Allen, 223; *Brightman v. Brightman*, 100 Mass. 238; *Gilkie v. Marsh*, 186 Mass. 336.

The Examiner's chief difficulty seems to be an assumption that if this will be construed, as he evidently thinks it should be, as creating an estate in fee in Farwell J. Thayer determinable, however, upon his dying without surviving children, with an executory devise in that event to Mrs. Dillman, then the executory devise was not alienable. While this was true at common law, it is now fully covered by statute, R. L., Chap. 134, Sec. 2. The Examiner is apparently misled by the provision in the statute "may sell the land subject to the contingency." The "contingency" referred to is merely the contingency as to whether the grantor's estate will ever vest in possession or, in other words, whether the purchaser will ever get anything substantial. It is not a contingency upon the happening of which the

grantor is dependent for title. Her estate was fully vested in interest, though not in possession, and her deed conveyed it. This matter was fully considered and the cases cited in *McManus, Petitioner*, Land Court Decisions, p. 85, *ante*.

Decree for the petitioner.

HENRY F. ROONEY *v.* JOHN YOUNG.

Norfolk, July, 1906.

Writ of Entry — Action for Possession under R. L., Chap. 178, Sec. 47 — Review of the Earlier Statutes — Levy after Special Attachment — Survival of Action — Right of Grantee to Prosecute.

This is a writ of entry originally brought under the provisions of R. L., Chapter 178, Sec. 47 by one Rooney, a purchaser at execution sale of land specially attached as fraudulently standing of record in the name of a person other than the judgment debtor, to recover possession of said land from the holder of the record title. After this action had been brought said Rooney died intestate leaving as his only heir his mother, who subsequently made a deed of said land to one Donovan, together with an assignment of this chose in action, and said Donovan now moves for leave to appear and prosecute the action in his own name as demandant.

Two difficulties present themselves at the outset, one the language of section 9 of R. L., Chapter 171, and the other the decision in *Hunt v. Mann*, 132 Mass. 53.

In *Hunt v. Mann* it was held that a grantee of a purchaser at such an execution sale could not maintain a writ of entry. The law under which *Hunt v. Mann* was decided has, however, been materially altered by statute. One, and in itself conclusive, consideration for the decision in *Hunt v. Mann* was the fact that under the law as it then stood a deed given by a disseizee, not delivered on the land, was not valid as against the disseizor and those claiming under

him. *Barry v. Adams*, 3 Allen, 493; *Dadmun v. Lamson*, 9 Allen, 85; *Harrison v. Dolan*, 172 Mass. 395. This was changed, however, by Chap. 354 of the acts of 1891, now R. L., Chap. 127, Sec. 6, and one ground for the decision in *Hunt v. Mann* is thereby eliminated.

The decision in *Hunt v. Mann* was also based upon the fact that the statute then in force as to execution sales provided for the bringing of an action to recover possession by the purchaser alone. Gen. Stat., Chap. 103, Sec. 48. The levy of an execution upon the lands of a debtor served as a legal ouster of the debtor, but the levy by sale of an execution against the debtor upon the lands of a third party, while it served to convey any interest of the debtor, clearly would not oust the actual tenant. Unless expressly provided for by statute, no right of entry would therefore accrue. *Blood v. Wood*, 1 Met. 528; *Howe v. Bishop*, 3 Met. 26. The right to levy at all on property in the possession of some one other than the debtor was first conferred by Rev. Stat., Chapter 73, Sec. 1. Prior to that time the levy was an actual levy upon the land, and seizin, symbolical or physical, was delivered. Acts of 1783 Chap. 57; *Gore v. Brazier*, 3 Mass. 523; *Blood v. Wood*, 1 Met. 528, 534. There was no express statutory provision for levying on land of a debtor the record title to which, however, had been fraudulently conveyed away by him, though this could apparently be done without any explicit provision therefor. Report of the Commissioners on the Revision of 1834, Notes to Chapter 73. Such express provision was accordingly made, and the further right was added to levy on a right of entry, with a section providing a mode by which a creditor so levying might try his title, if disputed. Rev. Stat., Chap. 73, Sec. 1 and 16, and Notes of the Commissioners thereon. In 1844, to meet the decision in *Howe v. Bishop*, *supra*, this right was further extended to include real estate purchased by a debtor, with the record title placed for fraudulent pur-

poses in another, but the right of action in such case was restricted to the execution creditor. Acts of 1844, Chapter 107; *Livermore v. Boutelle*, 11 Gray 217. When the General Statutes were passed the right was still further extended to cover dry trusts, (not theretofore liable to execution, see *Russell v. Lewis*, 2 Pick. 508), and provision was also made for levy by sale in case of equities of redemption, and for an action for recovery by a purchaser at such sale as well as by the execution creditor. These latter two changes were made to meet the decision in *Foster v. Durant*, 2 Gray, 538. Gen. Stat. Chap. 103, Sec. 1 and 48, and Notes of the Commissioners on the Revision of 1860. In 1874 execution by sale was extended from equities of redemption to all interests in land, and the right and necessity of bringing action for recovery in case of fraudulent titles was extended to include the purchaser. Acts of 1874, Chap. 188. It was under the provision of this statute that the decision in *Hunt v. Mann* was made.

In the Revision of 1882 no change was made in the law as it stood under the act of 1874, (Pub. Stat., Chap. 172, Sec. 1, 49), but *Hunt v. Mann*, though decided under the provisions of the Act of 1874, was not published until after the revision of 1882. Then came the Act of 1891 validating the deed of a disseizee, and in 1902 the addition in Section 47 of Chapter 178 of the Revised Laws of the words "or by any person lawfully claiming under him" expressly inserted in accordance with the Commissioners understanding of the intent of the Act of 1891 to meet the decision in *Hunt v. Mann*. See the Report of the Commissioners on the Revision of 1902. This last change in the law seems to have escaped the attention of the learned author of the Notes on the Statutes, and *Hunt v. Mann* has been brought forward from the "Notes on the Public Statutes," as apparently applying to the present statute. Crocker, Notes on the Revised Laws, p. 765.

The second difficulty is in regard to the survival of the action. At common law a writ of entry abated on the death of the demandant. *Cutts v. Haskins*, 11 Mass. 56; *Brigham v. Hunt*, 152 Mass. 257. So far as abatement existed purely as a bar raised by the old common law pleading, when an heir, though he could not bring a writ sur disseizin, could nevertheless bring one cum titulo, or resort to a writ of right, though he must not bring a writ in the per if the tenant was in in the post, all such reasons for abatement disappeared in Massachusetts on the adoption of the present statutory writ, which includes all of the old forms including the writ of right. *Jackson on Real Actions*, p. 31, *et seq.*

In 1826 it was provided that the demandant's heir "or such other person as would in case the action were abated be entitled to commence the like action may on motion be permitted to prosecute." Acts of 1826 Chap. 70. This was held to unquestionably cover the case of a grantee of a devisee. *Sacket v. Wheaton*, 17 Pick. 103. In the Revision of 1836, however, the clause quoted was omitted, and provision was made for survival to the heir alone and that within a limited time. Rev. Stat. Chap. 93, Sec. 14; Chap. 101, Sec. 12. This restriction of the right was held to be intentional and exclusive. *Brown v. Wells*, 12 Met. 501; *Drake v. Curtis*, 1 Cush. 395. By the practice act of 1852 devisees on the death of a demandant were admitted to prosecute, and in the revision of 1860 devisees were, in conformity to this statute, added to heirs in relation to such actions. Acts of 1852, Chap. 312, Sec. 55; Gen. Stat., Chap. 127, Sec. 13 *et seq.*; Chap. 134, Sec. 11; Notes of Commissioners on the Revision of 1860. Substantially the same provisions were carried forward in the Public Statutes, and in the Revised Laws. Pub. Stat., Chap. 165, Sec. 14, Chap. 173, Sec. 11; R. L., Chap. 171, Sec. 9, Chap. 179, Sec. 11. These sections do not provide for the grantee of an heir or

devisee, and to the latter, at least under the provisions of the Public Statutes, the right has been held to be strictly limited. *Brigham v. Hunt*, 152 Mass. 257. The case at bar is not an action, however, that is brought by a grantee, or to which a grantee seeks to be admitted by virtue of the statutes relating to the survival of actions. The action was duly and properly brought by the purchaser, Rooney. On his death the right of action survived to his heir. By the statute of 1891 the interest of the debtor on the land taken under the execution by Rooney, and inherited by his mother, passed by her deed to Donovan, by whom, under the Revised Laws, all actions to recover possession both could and must be maintained in order to validate the execution sale. The suit must be commenced within one year after the return day of the execution, and it must not only be commenced but must thereafter be prosecuted with effect. *Cunniff v. Parker*, 149 Mass. 152. Moreover by the provisions of Chap. 402 of the Acts of 1897 (R. L., Chap. 173, Sec. 4), the assignee of a non-negotiable chose in action is now expressly permitted to "maintain an action thereon in his own name." The theory of the statute admitting another to prosecute is simply that the one so admitted is, in contemplation of the law, himself a demandant, one who has succeeded to the right of entry. *Butrick v. Tilton*, 155 Mass. 461.

Even under the law as it stood at the time of the decision in *Hunt v. Mann* the Court queried whether the demandant, though his deed was void as a conveyance of title to the land, could not bring an action in the name of the purchaser at the sale. In the case at bar not only was the deed valid, but there was in terms an assignment of the chose in action. The question whether the grantee of an heir could bring the action is not presented. The action was duly brought by the purchaser, must under the statute be duly prosecuted,

survived to the heir, was assignable by the heir, was so assigned, and I think that the assignee can now in the language of the Act of 1897 "maintain an action thereon in his own name."

Motion allowed.

WALTER A. MALOY *v.* ALICE MORRIS, ET AL.

Middlesex, August, 1906.

Widow — Right of Occupancy Under R. L. Chap. 132, Sec. 12 — Acquirement of Title Against the Heirs — By Tax Title — By Prescription.

The question in this case is whether title to the estate in controversy has been acquired by prescription through one Ann Morris, a predecessor in title of the petitioner.

The premises consist of a house lot in Somerville of which one Patrick Morris died seized in 1873, intestate, leaving surviving him a widow, Ann, and as his only heirs, four children and the issue of a deceased child, all by a former wife. His estate was inventoried as consisting of \$380 in personal estate and the house lot in question then valued at \$2,900. The widow, Ann, who was appointed administratrix, and who also claimed that the estate was indebted to her to a material amount (and such indebtedness appeared in her first account, which was filed and allowed in 1875), remained in possession of the house lot. In 1875 she petitioned the probate court for assignment of dower. In 1878 the court decreed that dower be assigned, commissioners were appointed, and a warrant issued; but nothing further was done. In 1878, 1879 and 1880 the estate was sold for the taxes of 1876, 1877 and 1878, assessed to the heirs of Patrick Morris, and was bought in at each tax sale by the said Ann. Considerable friction existed between Ann and some of the heirs, and in 1882 three of them employed counsel to secure from her an accounting in the probate court, and also possession of this house lot. A conference was accord-

ingly had and Ann's position was stated to be that she claimed to be in possession of the entire estate as matter of right, claiming title under her tax deeds; that the estate was largely indebted to her; that there was no equity of any value in the children; and that she defied any attempt to get her out. The matter was fully reported to the heirs and they were advised to take action, but decided not to do so, and nothing further was done by anybody until the bringing of this application for registration of title by the present petitioner. Ann remained in possession of the property until her death, December 28, 1901, when she left this estate by will to her step-son Thomas and his son Patrick D., who in 1902 conveyed to the petitioner. The respondents are all the heirs of Patrick Morris other than said Thomas.

The respondents contend that Ann was a co-tenant with the heirs, and that as such she could not acquire a valid tax title against them, nor title by prescription through adverse possession. The petitioner does not claim under the tax titles otherwise than as an element in his chain of title by prescription, and denies that Ann was in any sense a co-tenant with the heirs.

Under the provisions of R. L., Chap. 132, Sec. 12 (G. S., Chap. 90, Sec. 7; P. S., Chap. 124, Sec. 13) occupation by the widow with the heirs of her husband, or the receipt by her of her share of the rents and profits, without any assignment of dower, is to be deemed to be a lawful occupation and her estate to be an estate "with the rights of a tenant in common," so long as there is no objection on the part of the heirs. *Anthony v. Anthony*, 161 Mass. 343, 352; *Hastings v. Mace*, 157 Mass. 499; *Kirchgassner v. Rodick*, 170 Mass. 543. This negatives the petitioner's argument that Mrs. Morris had no estate in the premises upon the decease of her husband, and was in ab initio under an obvious claim to the entire fee necessarily adverse to any title in the heirs. Such quasi co-tenancy, however, lacks some of the essential

elements of an ordinary co-tenancy, so far as the rights of the heirs are concerned in regard to the payment of taxes, and to the exclusive occupation by the widow. The familiar rule that one cannot acquire a tax title against his co-tenants is based either upon estoppel, or upon the fact that the transaction amounted to a payment and extinguishment of a tax indebtedness, rather than to the purchase and acquirement of a tax title. In the case at bar there was neither indebtedness on the part of the widow, nor any duty resting upon her as to the taxes. Had the sale been for taxes assessed to her husband, the case would have been like that of *Hurley v. Hurley*, 148 Mass. 444, cited by the respondents. Had Mrs. Morris been merely a life tenant (under an assignment of dower or otherwise) she probably could not have acquired a tax title as against the remainder-men. *Ritchie v. Ritchie*, 171 Mass. 504. Her co-tenancy in this case, however, was a right of occupation only "with the heirs," and then only so long as they did not object. She had no duty or indebtedness as to taxes. Her actual occupation was very different from her right. It was an exclusive occupation without the consent of the heirs, against the protest of the sons, and under an open and defiant claim of right to the entire estate, continued by her and those claiming under her for over twenty years. Even if the respondents were ordinary co-tenants and her original possession was in part a possession as of right under a limited title, I think the continued possession of the entire estate under the circumstances in this case would both warrant, and probably necessitate, a finding of title in the petitioner by prescription. *Taft v. Decker*, 182 Mass. 106; *Joyce v. Dyer*, 189 Mass. 64.

Decree for the petitioner.

Parker D. Morris for petitioner.

H. V. Cunningham for respondent.

MASSACHUSETTS BAPTIST MISSIONARY SOCIETY *v.* FIRST BAPTIST CHURCH OF BROOKFIELD.

Worcester, October, 1906.

Deed — Grantee — Church and Religious Society.

This is a writ of entry brought by the demandant as grantee of the First Baptist Society in Brookfield against the First Baptist Church of Brookfield. The tenant's defense under a plea of nul disseizin is twofold (1) that the grantor in the deed to the demandant is not the original corporation of that name, and (2) that in any event the tenant is the owner of an undivided half of the demanded premises. There is no conflict in the evidence in this case, although the facts to be deduced therefrom, and the law applicable thereto, are in controversy.

The demanded premises consist of the Baptist Church and parsonage lots at East Brookfield. The first was conveyed in 1839 to "the Baptist Church and Society in Brookfield," being "a certain lot of land on which said Church and Society are about to build a house for the public worship of Almighty God," habendum, "to the said Baptist Church and Society, their successors, their heirs and assigns, for them and their use and behoof forever," and on the margin of the deed is the recital that "the Baptist Church and Society named in this deed are the same as heretofore known by the name of the First Baptist Church and Society in Brookfield." The second was conveyed in 1870 to "the Baptist Church and Society in East Brookfield," habendum "to the said Baptist Church and Society their successors and assigns to them and their use and behoof forever."

The First Baptist Society in Brookfield was incorporated by special act June 17, 1800. In 1903 there was trouble in the church and society, which became divided into two factions. An attempt was made to heal the trouble, and in pursuance thereof on May 15, 1903, a deed of the demanded premises was executed by three committee-men to the Massachusetts Baptist Convention. The Massachusetts Baptist Convention was the former name of the present demandant corporation, the name having been changed by Chapter 92 of the Acts of 1904. This deed proved to be invalid, however. The attempts at harmony having failed, the society then split in two, and each faction has since kept separate records, each claiming to be the original corporation. In June, 1904, one of these factions deeded to the demandant "all and singular the real estate situated in that part of said Brookfield called East Brookfield and more particularly described in a deed from Charles Edward Hood and others as a committee of said society to the Massachusetts Baptist Convention dated May 16, 1903, recorded with Worcester So. Dist. Deeds Book 1749, Page 21, this deed being given for the purpose of confirming the title attempted to be conveyed by said deed."

The tenant's main contention is that it is the owner of an undivided half of the premises, and that therefore (a) the deed to the demandant is invalid as against the tenant, and (b) that even if valid, the demandant is entitled to recover possession of an undivided half only. The tenant was incorporated on June 19, 1903, under the provisions of R. L., Chap. 36, Sec. 21. At the time of the deeds of 1839 and 1870 the First Baptist Church was not a corporation. The tenant's contention is that under a deed to an unincorporated church organization title will not be permitted to fail, but will pass to the grantee as a quasi corporation for that purpose.

It was unquestionably the purpose of our statutes from the

earliest days that donations for pious uses should not be lost because of the lack of a technical and proper grantee in the instrument employed. The distinction between the spiritual and temporal government in religious bodies in New England has undergone a curious transformation. Originally there was no distinction. Our earliest communities were simply communities combining in one organization all property owning, governing and religious functions. A citizen had to be a member of the church to be a citizen. As a community grew these functions grew apart, and the voter was not necessarily either a member of the property holding proprietors, nor of the church. Not only did religious affairs separate themselves from the common life of the community, but they became separated in their own bodies into two parts, one which enjoyed merely the privileges of religious worship, and another more select body for whom were reserved the privilege of the sacraments. The first became known as the society, the latter as the church. The functions of the church were solely and purely religious, while the society gradually became the property holding body. In recent times, however, this distinction has been disappearing, and the single form of government again appears, this time, however, with the addition of property holding powers, in the form of a legal incorporation, given to the church. Acts of 1887, Chapter 404.

While the two phases of the church and society existed together in the same parish prior to the statute of 1887 the church was purely and solely concerned with the administration of, and participation in, ecclesiastical affairs. *Burr v. First Parish*, 9 Mass. 277, 297; *Baker v. Fales*, 16 Mass. 488, 498, 520; *Stebbins v. Jennings*, 10 Pick. 172; *Silby v. Barlow*, 16 Gray, 329; *Leicester v. Fitchburg*, 7 Allen 90. At first it could not hold property at all, *Baker v. Fales*, 16 Mass. 488, 495, 497; *Atty. Gen. v. May*, 5 Cush. 336; *Weld v. May*, 9 Cush. 181; but in order that gifts to re-

ligious purposes should not be lost, conveyances to the church were deemed to be to the deacons. Acts of 1754, Chapter 12. Such a gift would not be held as against the society, if such existed, but on the contrary would be held for the benefit of the society. The church could not take to the exclusion of the society. A deed to the church would be in trust for the society, but a deed to the society would not be in trust for the church, although unquestionably for its benefit according to its strictly ecclesiastical needs. *Baker v. Fales*, 16 Mass. 488, 496, 503; *Stebbins v. Jennings*, *supra*; *Atty. Gen. v. May*, *supra*; *Warner v. Bowdoin Square Baptist Society*, 148 Mass. 400; *Osgood v. Rogers*, 186 Mass. 238.

To construe the deeds of 1839 and 1870 as deeds to the two separate phases of the same parish church organization as two separate corporations holding as tenants in common, would be in violation not only of the common and well known legal practice of that time, but of the very purposes for which the two organizations of church and society then existed. The phrase "First Baptist Church and Society" was the common and correct designation of that particular religious organization, and the deed must be construed as transferring the title to the proper and appropriate corporate body which represented it for that express purpose, to wit, the society.

Judgment for demandant.

D. P. Bailey for demandant.

J. P. Dexter for tenant.

GEORGE H. NEWMAN *v.* EMORY H. NASH ET AL.

Berkshire, December, 1906.

Restrictions — General Scheme — Personal Agreement.

The petitioner in this case claims title to a lot of land at the corner of North st. and Maplewood ave. in Pittsfield, under a deed in which certain restrictions were placed upon the property, which restrictions he claims are no longer in existence or enforceable. The respondents say that the restrictions were imposed for the benefit of their estates, and that the petitioner's land must be registered subject to them.

The entire property in question constitutes a portion of the former "Maplewood" school property situated on the easterly side of North st. in Pittsfield. The principal portion of this estate, constituting all of the property now in controversy, was acquired in 1867 by one Spear. Shortly prior to 1882 Mr. Spear built a street, now called Maplewood ave., through the property from North st. to First st., and began to sell off the strip on the south side of the avenue for house lots. He himself removed to Ohio and placed the property in the hands of the respondent Nash as his real estate agent. He instructed Mr. Nash that all of the lots on the south side of Maplewood ave. were to be sold for strictly residential purposes, and with a setback for the dwelling houses to be erected there, of 33 feet. All of the lots on the southerly side of Maplewood ave. were sold for Mr. Spear by Mr. Nash, and each purchaser was informed by him of these terms. In each deed the phraseology varied in regard to the restrictions, but they all contained some provision for a set back of "at least thirty" or of thirty-

three feet from the south line of Maplewood ave. The petitioner's lot is situated on the corner of Maplewood ave. and North st. There was one lot situated on North st. only, immediately south of the land now of the petitioner, and the deed of that lot provided for a setback from North st. The lot on the corner of Maplewood ave. and First st. was sold with a provision for a set back from Maplewood ave. but none from First st. The land on the North side of Maplewood ave. was sold without any restrictions.

In the latter part of January said Nash negotiated sales of the three remaining lots, including that of the petitioner, with the same understanding as to dwelling houses and set back, and with a further statement to the purchaser of the lot now of the petitioner that Mr. Spear did not want any barn built up against the house then belonging to one Hubbell and next adjoining the petitioner's lot on Maplewood ave. The deeds were all drawn together, forwarded to Mr. Spear in Ohio, executed and acknowledged by him under one date, and returned together to Mr. Nash for delivery. The deed of the petitioner's lot contained this provision, "It is one of the conditions of this conveyance that no barn shall be built on said land, and that the dwelling house to be erected thereon shall be set not less than 33 feet south of the south line of said avenue and not less than 40 feet east of the east line of North st." Barns have been erected on all the lots on the south side of Maplewood ave. except the petitioner's. Mr. Spear is now dead, having, before his death, sold all of his "Maplewood" lands.

Whether given restrictions constitute equitable restrictions which can be enforced in favor of persons other than the grantor, does not depend sometimes so much upon the technical form of the provisions in question, or upon the exact status of the legal title, as upon purely equitable considerations based upon the intent of the parties and the circumstances under which the respective titles are conveyed. It

is oftentimes practically a matter of estoppel. Where one has taken his land subject to a provision in regard to its use, which is either made expressly for the benefit of other land of the grantor so as to constitute an equitable easement running with the land, or which it is apparent from the circumstances of the case, or from the record, has been made in pursuance of a general scheme or prior agreement entered into by the grantor for the benefit of other lands then owned by him, and has constituted a part of the consideration for the acquirement of such lands from the common grantor by intervening purchasers, equity will not permit the grantee to use his land in violation of the terms of his deed, but will enforce them in favor of such intervening purchasers, whether the terms are expressed in the form of an agreement, covenant, common law condition or ordinary restriction. *Whitney v. Union Railway*, 11 Gray 359; *Parker v. Nightingale*, 6 Allen 341; *Peck v. Conway*, 119 Mass. 546; *Hopkins v. Smith*, 162 Mass. 444; *Bacon v. Sandberg*, 179 Mass. 396; *Wilson v. Mass. Inst. of Technology*, 188 Mass. 565, 581; *Goldberg, Petitioner*, Land Court Decisions, p. 117, *ante*. In the case at bar there was nothing in the record title in regard to the erection of a barn, nor was there any agreement in fact in regard to the matter except in the deed of the petitioner's lot and the statement of the grantor's agent that it had reference to the adjoining Hubbell lot. So far as this was intended for the benefit of the Hubbell lot, it was an attempt to create a restriction for the benefit of a third party, and was therefore invalid. *Edwards Hall Co. v. Dresser*, 168 Mass. 136; *Hazen v. Matthews*, 184 Mass. 388. As to the set back on North st. also, there is nothing in the record to indicate that it formed part of any agreement or general scheme on the part of Mr. Spear for the benefit of his Maplewood property. The scheme was one which related to Maplewood ave. only. In the deed of the other lot fronting on North st., there had been a clause

providing for a set back from that street, but in the deed of the lot on the corner of First street the only set back was from Maplewood ave. Slight variance in the language or terms of the different deeds in which the common grantor had inserted provisions in pursuance of a prior agreement or general scheme, or even the omission in a few of the deeds to insert any provisions, will not render the restrictions, when expressed, ineffectual or unenforceable in favor of those lands for whose benefit they were granted. *Bacon v. Sandberg*, 179 Mass. 396. On the other hand a mere agreement, for the creation of restrictions, which is not carried out, will not bind a subsequent grantee. It was in the power of the prior purchasers to have had proper stipulations as to the method of use of the grantor's remaining land inserted in their own deeds, if they had so desired. *Loehr, Petitioner*, Land Court Decisions, p. 46, *ante*; *McCusker v. Goode*, 185 Mass. 607. The provisions for a set back from North st., like that in regard to the barn, in the absence of anything in the grant itself, or in the circumstances or situation at the time of the grant to make it manifest that the restriction was in pursuance of any prior agreement by which those taking title under the grantor should in equity be bound, must be construed to be a personal agreement with the grantor, which cannot now be enforced. *Badger v. Boardman*, 16 Gray 559; *Jewell v. Lee*, 14 Allen, 145; *Sharp v. Ropes*, 110 Mass. 381; *Lowell Inst. for Sav. v. Lowell*, 153 Mass. 530; *Clapp v. Wilder*, 176 Mass. 332; *Welch v. Austin*, 187 Mass. 256.

The provisions for a set back from Maplewood av., however, not only were a part of a general scheme, as a matter of fact, but clearly so appear from the deeds themselves which form a part of the record title under which the petitioner claims. The provision was one that formed a part of a scheme for the opening up of this tract of land for residential purposes, and which contemplated, and also ex-

pressly provided for, the erection of dwelling houses on the land, which dwelling houses should set back 33 feet from the avenue. Neither the language nor the intent of the parties, however, can fairly be construed to go beyond the erection of the first building. In most of the deeds this explicitly appears: — “the dwelling house to be erected on said land shall set . . . ,” “shall erect a dwelling house which shall set . . . ,” “for the purpose of erecting a dwelling house thereon which is to be located . . . ,” etc. The restriction is limited to the first house erected on the granted premises, being the one that is now standing there. *Baptist Social Union v. Boston University*, 183 Mass. 202; *American Unitarian Society v. Minot*, 185 Mass. 589; *Welch v. Austin*, 187 Mass. 256.

Decree for petitioner, subject to the restriction for the benefit of the lands of the several respondents that the dwelling house now standing thereon shall set back at least 33 feet from the southerly line of Maplewood ave.

Pingree, Dawes & Burke, for petitioner.

Noxon & Eisner, for respondent.

DENNIS CALLAHAN, PETITIONER.

Suffolk, January, 1907.

*Deed to Church — Condition — Charitable Trust — Sale
— Cy Pres.*

In this case title was conveyed in 1840 by one Nathaniel Minot to certain trustees of the First Baptist Church of Dorchester in trust to hold for the purpose of erecting and maintaining a meeting house for public worship according to the Baptist faith. The deed provided in careful and elaborate terms for the maintenance of worship in the meeting-house to be erected notwithstanding, and in case of, any disagreement which might arise between the Baptist Society and the Church, the former being the temporal, and the latter the ecclesiastical body, which, together with the pew holders and the congregation, unite to form the ordinary parish under the Baptist form of discipline. American Baptist Miss. Soc. v. First Baptist Soc. of Brookfield, Land Court Decisions, p. 249, *ante*. The only other provision in the deed which affects the title is that "in case the legislature of this Commonwealth shall at any time hereafter incorporate a board of trustees with authority to hold the property herein conveyed and appropriated, the proceeds and income thereof, for the support of such ministers as shall be elected and settled in the manner herein prescribed, then said grantees, the survivors, and assigns, and the survivors of them shall convey the property herein granted and the proceeds thereof to such board of trustees when incorporated." By Chapter 128 of the Acts of 1899 it was provided as follows: "James H. Goodwin, Hatheway H. Dinsmore and Charles H. For-

sayth are hereby empowered to act as trustees of the First Baptist Meeting House of Dorchester situated in Neponset Village." In 1905 said trustees petitioned the Probate Court claiming to be trustees under said Minot deed, and prayed for leave to sell this estate because of changes in the character and population of the locality, and to invest the proceeds in the purchase of another lot in a suitable locality, together with a suitable meeting house thereon for worship under the terms of the trust set forth in said deed. Upon this petition the court ordered notice by publication and also personally upon the lineal descendants of Nathaniel Minot so far as they could be ascertained, and appointed, as guardian ad litem for all persons not ascertained or not in being who were or might become interested in the proceedings, the learned Judge of Probate for Norfolk County. The guardian reported very fully on the matter, and in favor of the necessity and expediency of the proposed sale and investment. The Court thereupon ordered such sale and investment, and the petitioner became the purchaser.

It seems clear that the provisions of the Minot deed did not constitute a condition but did constitute a trust. *Hayden v. Stoughton*, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Brattle Sq. Church v. Grant*, 3 Gray 142; *Rawson v. Uxbridge*, 7 Allen 125; *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal Mission v. Appleton*, 117 Mass. 326; *Crane v. Hyde Park*, 135 Mass. 147; *First Universalist Church*, Petitioner, Land Court Decisions, p. 209, *ante*.

One difficulty found with the title is the lack of any conveyance from the survivors or heirs of the survivors of the original trustees to the present incorporated board. It seems to me that the title passed by operation of law under the statutes. By the terms of R. L. c. 147, s. 6, "a new trustee . . . appointed in the place of a former trustee in conformity with a written instrument creating a trust shall, upon

giving such bond as may be required, have the same powers, rights and duties, and the same title to the estate as if he had been originally appointed." The present board of trustees was clearly appointed by the Act of 1899 in conformity with the written instrument creating the trust. The original deed provided for the transfer of title to the incorporated trustees by deed, and prior to 1878 such conveyance was probably necessary. Under the terms of the present statute, however, the conveyance is not necessary. Pope, Petitioner, Land Court Decisions, p. 173, *ante*.

The power of the Probate Court to order the sale seems also to be fully covered by statute. By the terms of R. L. c. 147, s. 15, "if the sale or conveyance, transfer or exchange of any real or personal property held in trust . . . appears to be necessary or expedient . . . the Probate Court may, upon the petition of a trustee . . . after notice and other proceedings as hereinafter provided, order such sale and conveyance . . . to be made, and reinvestment and application of the proceeds of such sale in such manner as will best effect the object of the trust." The provisions of the statute are very broad. Under it the purpose of a trust cannot be entirely disregarded. Davis, Petitioner, 14 Allen 24. Neither the power of the Equity Court acting under the doctrine of *cy pres*, nor the power of the Probate Court under the limited statutory authority above quoted, can be exercised in disregard of the object of the trust, but rather in either case "in such manner as will best effect the object of the trust." To this end the Court has full power however. The facts in the case at bar bring the matter squarely within some of the recent cases. *Weeks v. Hobson*, 150 Mass. 377; *Amory v. Attorney General*, 179 Mass. 89. (Note. And see *Sears v. Attorney General*, 193 Mass. 551.)

Decree for petitioner.

SELINA FONTAINE v. AGNES AMELOTTE.

Worcester, January, 1907.

Homestead — Devise of "Homestead Estate" — Construction.

This is a writ of entry to recover possession of a tenement house lot situated at the northwest corner of the original home place of the late Thomas Martin of Spencer; the question at issue being whether the demanded premises passed to the defendant under the second clause of his will by specific devise of the testator's "homestead estate," or passed to the plaintiff and the defendant as co-tenants under the residuary clause of said will.

In 1859 said Martin purchased a tract of land on the corner of Maple and Cherry streets in Spencer, including all of the premises now in controversy, and an adjoining strip on the east subsequently sold off by him in his lifetime. On the property so purchased, said Martin built a house and barn with a woodshed and other outbuildings. About 1876 he purchased an old engine house from the town, moved it on to the northwest corner of the lot, and used it for some five or six years as a workshop. About 1882 he made the workshop over into a two-tenement house which, from that time until his death he rented to various tenants, continuing to occupy the remainder of the property as his home. No fences were ever erected on any of the property, nor was there any demarcation of the tenement house lot from the rest of the estate. A woodshed was erected immediately in the rear of the tenement house for the use of the tenants, and back of that was a larger woodshed used in

connection with his own dwelling house, a part of which, however, the tenants of the tenement house used occasionally for storage purposes. The privies used in connection with the tenement house stood against the barn considerably to the east of what the plaintiff claims as any part of the tenement house lot. Between the tenement house and the dwelling house is a driveway leading back from Maple street to the barn. The tenement house faces Maple street, and has a front door at its extreme northwest corner. Access to the back door is had over said driveway. Said Martin lived in the dwelling house from the time he erected it, shortly after 1859, until his death. His older daughter, the plaintiff, lived with him until her marriage, and the younger daughter, the defendant, with the exception of three years, always lived with her father, together with her husband and children. At the time of his death said Martin had, besides the property on Maple and Cherry streets, certain real estate on Adams street in said Spencer, and personal property to the amount of about \$2,600.

By the first clause of his will he gave to the plaintiff \$1,000, by the second clause he gave to the defendant "my homestead estate situated on the corner of said Maple and Cherry streets;" together with sundry personal effects, and by the last clause left all of the residue and remainder of his estate equally between his said daughters.

The phrase "homestead" has been considered in a number of decisions: *Bacon v. Leonard*, 4 Pick. 277; *Taylor v. Mixer*, 11 Pick. 341, 346; *Eliot v. Thatcher*, 2 Metcalf 44, note; *Perkins v. Jewett*, 11 Allen 9; *Melcher v. Chase*, 105 Mass. 125; *Backus v. Chapman*, 111 Mass. 386; *Frazer v. Weld*, 177 Mass. 513; and see also *Dudley v. Milton*, 176 Mass. 167; *Millerick v. Plunkett*, 187 Mass. 97. In *Taylor v. Mixer* the Court suggests that the phrase "homestead" may cover lands that are detached, and yet so intimately connected with the dwelling house as in effect to constitute

a part of the homestead; that the word is not one that has acquired a definite signification in law, and may probably be understood differently in different places. In *Eliot v. Thatcher* the Court says that "homestead" signifies "all his real property in his actual occupation and which was not severed by any real estate belonging to anyone else," meaning "that part of a man's landed property which is about and contiguous to his dwelling house, distinguishing it from outlands." In *Perkins v. Jewett* the testator had a well-known homestead. Subsequently he purchased an adjoining piece of land in the rear of his house lot, but separated by a board fence. This lot was not used by the testator in connection with the old homestead, but was occupied by tenants. The Court says that "the fact of unity of possession and actual occupation in common have been regarded as the most decisive tests. Not that the circumstance that a portion of a well-known and well defined homestead has been occupied temporarily by a tenant would affect the construction of a devise; but the case to which the principle we have stated applies is, where there is the absence of any previous use and occupation of the premises as a homestead at any time. The fact of being under one common inclosure or not would also be a circumstance of some weight." In *Melcher v. Chase* the testator had on his home place, besides his mansion house with outbuildings and garden, two cottages, one occupied by his man servant and the other by his sister for whom the testator had built the house, and with whose support he expressly charged his homestead. It was held that the devise of the homestead included with the mansion property the two cottage lots adjoining, and originally not divided from it by fence or otherwise. In *Backus v. Chapman* the testator had built a new house and removed with his family into it. He enclosed the old house by a fence and rented it to tenants, although he continued to use a part of the ell of the old house, and the well which stood south of

it, in connection with his dwelling house. It was held that he had severed the old house from the homestead.

In *Otis v. Smith*, 9 Pick. 292, a testator devised certain houses "with all their appurtenances." The Court held "that the outhouses, stable, etc., should pass under the general term appurtenances; that is, we have a right to infer such intent from the use made of them by the testator himself as parcel of his mansion house. But with respect to the land south of the stable covered with a tenement, which has been in the occupation of tenants ever since it was erected, no such intent can be found in the will. Then we must look into the evidence in regard to the occupation; and that is all on one side and wholly uncontradicted. It is, that from the time of the first occupation of the mansion house to the death of the testator, this has been used as a separate and distinct estate, being let to tenants who had no connection with the testator's family, and no privilege in any part of the curtilage of the mansion house. Had it been occupied for the whole or even part of the time by the testator's servants, taking their wages in the rent, or without paying any rent, the case would be different; but treating it as the testator did in his lifetime for more than thirty years, we can see no more reason for supposing that this land and tenement passed by the specific devise of the house and appurtenances, than that of the adjoining house on State street should so pass; the difference being only in the size and value of the buildings."

The rule deducible from these cases seems to be that where the testator has used a given estate as a homestead, the whole of it will be carried by a devise of his homestead, unless some portion has been definitely separated by the testator himself. As said in *Aldrich v. Gaskill*, mere temporary rental of portions will not sever it. In the case at bar the testator never made any physical severance of the demanded premises. It was originally a part of the homestead,

and was used as such, and although he later changed the use of it, it was never permanently out of his control.

Judgment for tenant.

A. W. Curtis for demandant.

Blackmer, Vaughan & Smith for tenant.

CLARENCE W. ROWLEY ET AL., TRUSTEES, PETITIONERS.

Suffolk, February, 1907.

Charitable Trust — Power of Sale in Trustee.

This is a petition brought under Chapter 344 of the Acts of 1906 by the trustees under a trust indenture to determine their power to sell certain real estate held by them thereunder. The Attorney-General has appeared and filed a statement that he does not wish to be heard. By a trust instrument dated January 29, 1906, it was agreed that certain real estate previously conveyed by one James L. Simonds to the petitioner Rowley should be held by him upon a public charitable trust, namely: for the erection and maintainance of a female seminary to be administered by him and by Everett C. Bumpus, Esquire, as associated with him in said trust. The first clause of the indenture provided that said Rowley may bargain and sell or mortgage any part or parts of the said real estate subject to the assent of said Bumpus in writing and a release by him of all right, title or interest which may in any way rest in him under the terms of the indenture, with a provision that no purchaser shall be liable for the application of any purchase money. The second and third clauses provide for a reconveyance under certain conditions not now material, to said Simonds. By the fourth clause of said trust agreement it was provided that after the death of said Simonds "any real estate or personal property remaining after said Rowley and Bumpus shall have taken therefrom their charges for fees for their services in all matters . . . shall be conveyed and trans-

ferred to said Bumpus and Rowley as trustees, . . . and applied to the erection and maintainance of " said seminary. By the eighth clause of said agreement it was provided that " if at any time while the said Rowley holds the title under this agreement to the real estate . . . (in question) . . . the said Rowley and Bumpus agree that it is for the best interest of the estate to sell and convey or mortgage the same, or any part of the same, they shall have the right so to do by following the provisions in the first clause of this agreement, and invest any proceeds, . . . using any part of the interest and principal necessary to carry out the terms of this agreement." Said Simonds has now deceased and said Rowley still holds title to the lands in question.

Professor Gray, in his book on Perpetuities, says: " As has been shown, the natural meaning of a perpetuity is an inalienable, indestructible interest. In this sense charitable trusts are perpetuities. And this is no arbitrary doctrine, but arises from the nature of such trusts. For while, generally, a trust is not good unless there be a natural or artificial cestui que trust, charitable trusts are an exception. They are recognized as valid, but yet they do not ordinarily have any definite cestuis que trust. They are therefore inalienable, because there is no one to alienate them. No one has any alienable rights, because no one has any rights." Gray on Perpetuities, 2nd Edition, Section 590. In a note to the section above quoted he adds, " When it is said that property given on Charitable trusts is inalienable, it is not meant that such property cannot be alienated by the paramount action of the Sovereign, through the legislature or the Courts," and then cites many of the English and American decisions to that effect. And see the cases cited in Callahan, Petitioner, Land Court Decisions, p. 258, *ante*.

If necessary to the proper administration of the trust, a court of equity will order a sale even where it is forbidden by the terms of the trust instrument itself. " If the land

cannot be occupied as intended by the testatrix it is proper that it should be sold. The provision in the will that the trustees shall have no power to sell any part of Seven Oaks hardly would be construed as any intent to limit the power of the court to authorize a sale, assuming that it is possible to limit it, that is, to make a specific land inalienable forever. (Authorities cited). But, however this may be, the codicil authorizes and directs the trustees to sell any portion of the real estate which cannot be used advantageously, and taking this with the will, we are of opinion that a sale may be made." *Amory v. Attorney General*, 179 Mass. 89, 105.

It seems to me that the language of Professor Gray's text, if it is to be modified at all, should be modified still further. The object of a charitable trust as to land ordinarily requires, as well as implies, its inalienability; but inalienability under any and all circumstances is not a necessary, though it may be a usual, element of such a trust. Just as alienation may be authorized by the legislature or the court if necessary or expedient to the real purposes of the trust, so it may be expressly authorized by the terms of the trust itself, (in which case it would not come at all within the subject under consideration by Professor Gray) or be so obviously beneficial to the purpose and execution that a sale by the trustee would be not only impliedly authorized but required. Such a case is put by Lord Brougham in *Attorney General v. Hungerford*, 2 Cl. & F. 356, 373. "An alienation might be fit; not only justifiable, not only harmless as regards the breach of trust or abuse of trust by the trustees, but might be a fit course for them to adopt, . . . where they could not do their duty to the charity if they did not alienate a part of the land." In *Attorney General v. Warren*, 2 Swanst 291, cited by Lord Brougham in the decision just quoted, the Master of the Rolls, Sir Thomas Plumer, had said (302) "There is no positive law which says that in no instance shall there be an absolute alienation. The principle that

governs all the cases is this, that trustees are bound to a provident administration of the fund for the benefit of the Charity. . . . Alienation, not improvident but beneficial to the charity and conformable to the rule which ought to guide the trustees, may be good."

In *Magdalen Coll. v. Attorney General*, 6 H. L. C. 189 the opinion rendered by the Lord Chancellor, Lord Cransworth, begins with the statement, "Though there certainly is not, as far as I am aware, any positive law which prohibits the sale of charity lands, yet it is obvious that such a sale can very rarely be justified." And so in *Attorney General v. South Sea Company* 4 Beav. 453, the Master of the Rolls says: "It is plain that in ordinary cases, a most important part of the duty is to preserve the property; but it may happen that the purposes of the charity may be best sustained and promoted by alienating the specific property. The law has not forbidden the alienation, and this court upon various occasions with a view to promote the permanent interest of charities has not thought it necessary to preserve the property in specie, but has sanctioned its alienation. That which the Court might have done upon its own consideration of what would have been beneficial to the charity might have been done by trustees upon their own authority, in the exercise of their legal powers; and however imprudent it may have been in trustees to take so great a risk upon themselves, and in other parties to contract with them under such circumstances, yet if it should appear upon subsequent investigation that the transaction was fair and beneficial to the charity it does not appear to be the duty of the Court to set it aside." Sugden commenting on Lord Brougham's observations in *Attorney General v. Hungerford* says: "It would not be safe to act upon them. No prudent purchaser would accept a conveyance." (Sugden, *Law of Property* 535.) Following the trend of the judicial decisions, it has now been provided in England by statute that the trustees

in whom the lands of the charity are vested cannot sell them under a power of sale contained in the deed otherwise than with the authority of Parliament, or of the court, or with the approval of the charity commissioners. In rendering judgment in the case of *Re Mason's Orphanage*, [1896] 1 Ch. 54, affirmed in [1896] 1 Ch. 596, Stirling, J., explained the state of the law on this question before the passage of the Charitable Trusts Act as follows: "A sale, lease or mortgage made in accordance with an express power was good. On this I may refer to the judgment of Lord Cransworth (then vice chancellor), in *Atty. Gen. v. Hardy*, 1 Sim. N. S. 338, where it was held that a trustee of a Wesleyan chapel under a deed which contained a power of raising money by mortgage might become himself a mortgagee, and if he did so become, might exercise all the rights of a mortgagee, although in opposition to the trusts. Even when no express power of sale existed, a sale might be made of the charity estate, provided it were in accordance with a provident administration of the estate for the benefit of the charity; but the purchaser took subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances." The matter has also been regulated by statute in some of the United States. 5 Am. & Eng. Ency. 914. Whether under statutory regulation or not, however, the principle seems to be as stated in *Re Mercer's Home* 162 Pa. State 232, that "nothing short of a plain unequivocal direction that no part of the land shall be parted with for any purpose whatever ought to be held sufficient to restrain the managers from doing that which the interests of the charity under their control require of them." In a Missouri case the court recognizes the general principle laid down by Professor Gray, but qualifies it so far at least as an express power of sale is concerned. "When the trustees are invested with an express power to make the alienation in question, there is, of course, no room for contention. In the absence

of such an express power, it being the very essence of a charity that it shall endure forever, lands which are made the subject of a charitable trust are deemed to be alike inalienable, whether it is so declared in terms or not." *Lackland v. Walker*, 151 Mo. 210.

In Massachusetts a power of alienation has been recognized in several cases. "When such property is held under trust for the general purposes of the society and cannot otherwise be conveyed, the legislature has constitutional power to authorize the trustees to convert their real estate into personal in order that the avails may be reinvested and otherwise appropriated for the purposes of the trust." *Sohier v. Trinity Church*, 109 Mass. 1, 17; and see also *Pine Street Society v. Weld*, 12 Gray 570. In *Amory v. Attorney General* also, the court in addition to its own powers exercised under the doctrine of *cy pres* (a very different principle from that now under discussion) recognizes and upholds the power of sale given to the trustees in the codicil to the testator's will. *Amory v. Atty. Gen.* 179 Mass. 89, 105. It is the risk and danger to a purchaser, however, so incisively stated by Lord St. Leonards in his comments on *Atty. Gen. v. Hungerford*, that has led to such statutory provisions as are found in the English Charitable Trusts Act, the Price Act in Pennsylvania, and presumably the Massachusetts Act of 1906 under which this petition is brought. That this court can determine the necessity for any proposed specific action and any other facts required therefor seems clear.

This trust agreement goes much further, however. It vests, or attempts to vest, full discretionary power in regard thereto in the two individuals selected by the settlor for that purpose. But this was one of his principal purposes, preliminary to, or rather an integral part of, his whole scheme. They are to use the trust estate by converting such part of it into money as and when they personally deem it for the best interests of the trust so to do, first in the erection and

thereafter in the maintainance, of the seminary. This is neither hostile to, nor dehors the purpose of the trust. On the contrary it is one of the terms of the trust, and proper to its reasonable administration, that the petitioner has power to sell and convey, or mortgage, from time to time, the whole or any part of the first three parcels of land described in said deed from Simonds to Rowley with the written assent and release of all right, title and interest therein by said Bumpus, and a certification by them that such conveyance is for the best interest of said trust estate.

Decree accordingly.

GEORGE S. MERRIAM ET AL. v. RALPH H.
SEELYE ET AL.

Hampden, March, 1907.

*Restrictions — Effect as to Third Parties of Agreement to
Release — Effect of Sale for Taxes.*

The question presented by this case together with the two others which were tried with it, is as to the present existence and validity of the restrictions against the erection of any buildings on the west side of Chestnut st. in the City of Springfield originally imposed in certain deeds given by one Jonathan Dwight, who in 1822 purchased the entire property in controversy, laid out what is now known as Chestnut st. through the westerly portion of it near the edge of a steep bluff which there breaks off to the westward, and immediately began selling off house lots. The lots as originally sold by Mr. Dwight were large tracts extending on both sides of the street, and each deed contained a restriction against the erection of buildings on the portion to the west of Chestnut st. The original house lots have since been greatly subdivided and otherwise changed, and in the course of the many transfers of title both the burden and the benefit of the restrictions have, as to many of the present lots comprised within the limits of the original estate, come together in the same ownership. Title to some of the present estates is held under deeds which contain an express provision that the grantees, their successors and assigns, are to have no interest appurtenant to their estate, or otherwise, in any of the original restrictions, and that the grantees release said restrictions.

The question raised in regard to the effect of this provision as to the lots on the west side of the street belonging to owners other than the grantors in the deeds, is an interesting one. It has been vigorously contended that nobody can take advantage of the covenants in a deed, or of an estoppel created by a recital or express agreements contained in a deed, except the parties to the instrument, or those having their estate. It is also argued that a restriction is an equitable easement, and must be treated in accordance with the law of easements; that no easement can be created for the benefit of a third party, that correspondingly neither can a restriction be reserved for the benefit of a third party, and that analogously a release of restriction cannot operate for the benefit of land of a third party.

The right to the enforcement of an equitable restriction, or rather the benefit of a restriction which has been created upon various tracts of land as part of a general scheme of improvement and development, is not a legal right. The whole doctrine, as it has grown up in Massachusetts, is the creation of equity, and is based, not upon a grant express or implied, or upon any technical forms employed, but rather upon purely equitable considerations arising principally from the circumstances under which the respective parties obtained title to their lands. The enforcement of restrictions which form part of a general scheme of improvement rests, not upon a right created by grant or reservation in favor of others, or upon any absolute right legal or equitable, but rather upon an estoppel which equity will enforce as a matter of common justice against one who has taken his land subject to a restriction which he knew either from the record or the circumstances of the case was imposed for the benefit of others, and the existence of which was relied upon by them as a consideration in acquiring their lands. This seems to be the principle apparent in all of the decisions from *Whitney v. the Union Railway*, 11 Gray, 359, to *Evans*

v. Foss, 194 Mass. 513. (Feb. 1907.) See also an article by Prof. Ames, 17 Harvard Law Review, 174. As suggested by Mr. Justice Loring in *Bailey v. Agawam Bank*, 190 Mass. 20, equity does not enforce such provisions because they are restrictions, but rather they are called equitable restrictions because they are matters in the nature of easements, servitudes, or restrictions running with the land, which equity will enforce.

Applying the same reasoning and the same principles to the effect of a release, it seems to me that where one has accepted a deed, and in consideration thereof or by an express stipulation therein, has agreed that he will release and renounce the benefit of restrictions upon all lands affected thereby whether owned by his grantor or not, equity will not thereafter intervene on his behalf or for his benefit to uphold them, nor will it thereafter lie in his mouth to assert in a court of equity that he has a "right" to their enforcement.

The present Seelye estate together with certain other lots came into the possession of one Eunice L. Edwards, who died in 1875, and her heirs, in 1878, conveyed to George Merriam a strip from the southerly portion of this estate by a deed which contained no mention of restrictions in the granting clause, but which excepted the "conditions" from the covenant against encumbrances and the covenant of general warranty. So far as said remaining Edwards land is concerned, the benefit of the original restriction against building on the northerly part of the present Merriam land was extinguished by merger when both tracts came into the ownership of Edwards. When the Edwards heirs sold to Merriam the restriction was not reimposed in favor of their remaining land, but the lot passed subject to the restriction in favor of all other lots to which the benefit was originally appurtenant. The restriction was therefore properly excepted from the grantors' covenants. This amounted, however, merely to an exemption from liability on the covenants;

not in any way to the creation of a restriction in favor of the remaining land of the grantor. *Wendall v. Fisher*, 187 Mass. 81.

The principal contention in the case of the Haile heirs, petitioners, is founded upon their claim of title through certain sales for taxes, whereby they assert that they have acquired a title free from all easements or restrictions. Whether a tax deed racks a title to the extent of clearing it from equitable rights to enforce restrictions, has never so far as I know been expressly adjudicated, although it has been so intimated in several dicta. It was not supposed by conveyancers that it had this effect prior to the decision in *Hunt v. Boston*. As a result of the possibilities suggested by that case the statute of 1905 (Acts of 1905, Chap. 193) was enacted. I rule that these tax sales did rack the title, and that the prayer of the petitioners in the Haile case must be granted, viz: that the restrictions be determined to be invalid as to the tract of Edwards land near the foot of Edwards st., now standing in the name of the heirs of William H. Haile. *Hunt v. Boston*, 183 Mass. 303; *Weeks v. Grace*, 194 Mass. 296. With the burden, however, there was extinguished also any benefit of the restrictions in favor of said Haile lot.

Decree accordingly.

R. W. Ellis, F. H. Stebbins, H. G. Whitman, for petitioners.

Carroll & McClintock, S. S. Taft, for respondents.

JOHN J. SULLIVAN v. MANUEL P. BEGASO, ET AL.

Essex, May, 1907.

*Fraudulent Conveyance — Claim of Homestead Exemption
— By Tort Feasor — Special Attachment — Rights of
Subsequent Judgment Creditor.*

This is a writ of entry brought under the provisions of Revised Laws, Chapter 178, Section 47, by a purchaser at execution sale to recover possession of land specially attached by him as fraudulently standing in the name of Anna Begaso, since deceased, under whom all of the tenants claim title by inheritance in addition to a claim of homestead made by Manuel P. Begaso individually.

On September 13, 1902, the defendant Manuel P. Begaso was seized of the demanded premises, which constituted his home in Gloucester and was the only property which he then had. He had bought the place some years before with his own money and had partially paid off the outstanding mortgage on it. On that date, September 13, 1902, said Manuel committed an assault upon one Monize. On the same day, and immediately following the assault, he retained counsel. On September 19th he executed a mortgage to his counsel as security for professional services, and on the 20th, by advice of counsel and for the purpose, as he testified, of putting his property in his wife's name in such a manner that "I can stay in the house," he executed a declaration of homestead under the statute, and also a conveyance through a conduit without any pecuniary consideration and expressly subject to the homestead, to his wife the said Anna Begaso. On October 7th the property was specially attached in an

action of tort brought by said Monize against said Manuel as being property the record title to which was fraudulently standing in the name of the said Anna. Judgment was obtained by the plaintiff (see *Monize v. Begaso*, 190 Mass. 87) and the property was thereafter duly sold on execution sale to the plaintiff on March 21, 1906. The said Anna died January 22, 1904, intestate, and the tenants are her surviving husband and children, the latter all being minors.

Two points have been made by the defense. First, that the conveyance to the wife was not fraudulent against the plaintiff, the liability to damages arising from the assault on Monize not constituting the latter a creditor against whom a voluntary conveyance can be deemed to be a fraud. I find that both the conveyance and the homestead declaration were made for the purpose of placing this property out of the reach of any claim growing out of the assault which had been committed against Monize. There is some divergence of decision in this country on whether claims for damages arising from torts are within the protection of the statutes against fraudulent conveyances, and there is not much law on the subject in this state. I rule that the conveyance was fraudulent as against Monize and those claiming under him, and that the demandant is entitled to judgment in this action. *Livermore v. Boutelle*, 11 Gray 217; *Leonard v. Bolton*, 153 Mass. 428. (Note: — And see *Shepherd v. Shepherd*, 196 Mass. 179.)

The second point is that the tenants are nevertheless entitled to the benefit of the homestead, the execution not having been levied "for a debt contracted" before the writing required by section 2 of R. L. Chapter 131, was recorded; see R. L., Chapter 131, Sec. 4. There seems to be even less law with regard to this. The matter of homestead is one of public policy rather than of private right, established by statute for the protection of the family, and which, like the similar estate of dower, can only be barred in the specific

manner provided therefor, and is not even subject to estoppel. It is good except as against certain specified matters, among them "for a debt contracted" before the declaration is recorded. There is a marked distinction in the phraseology, as well as in the intent, of the homestead exemption act and that of the statute as to fraudulent conveyances. Under the latter from the time of the statute of Elizabeth a design to defraud future creditors is within the meaning of the act. Subsequent creditors may avoid a conveyance made with an express intent to defraud them, whereas the homestead exemption is good as against all but debts actually contracted. There is no "debt" under a chose in action in tort until after judgment. *Stevens v. Stevens*, 10 Allen 146; *Rice v. Southgate*, 16 Gray 142; *Pelham v. Aldrich*, 8 Gray 515; *Child v. Boston Co.*, 137 Mass. 516; and see *Savage v. Shaw*, 195 Mass. 571. Judgment may be entered for the demandant, subject to the estate in homestead of Manuel P. Begaso. See *Castle v. Palmer*, 6 Allen 401.

So ordered.

J. M. Marshall for demandant.

M. J. Conolly for respondents.

FIRST CONGREGATIONAL PARISH OF WEST
BOYLSTON *v.* INHABITANTS OF WEST BOYLSTON,
ET AL.

Worcester, October, 1907.

Town and Parish — Ancient Grant — Municipal and Parochial Uses — Title on Separation — Attempted Acquisition by Abutters of Easements over Common.

This is a petition for registration of title to the old Common at West Boylston, involving a controversy as to ownership of the fee between the First Parish and the town, the determination of certain rights claimed by the public, and of certain rights of way claimed as appurtenant to their respective estates by the owners of certain adjoining lots.

It appears from the records of the Second Precinct in Boylston, Sterling and Holden that, "In the year of Our Lord one thousand seven hundred and ninety-two a number of the inhabitants in the westerly part of Boylston and the southerly part of Sterling, the easterly part of Holden, together with a few from the northerly part of Worcester, assembled themselves together at different times to consider the propriety and expediency of a new town or parish being formed from the several quarters of the towns above named, and were generally agreed that such a measure would be practical and of common utility. The question of whether they should first petition for incorporation or provide themselves with the necessary accommodations for enjoyment of public worship among themselves, was then considered, and the result was it would be felt greatest wisdom first to establish the latter. Several spots were then viewed and pointed

out as being suitable whereon to erect a meeting house. At length it was agreed that a portion of the lands belonging to Capt. Joseph Bigelow, Abel Bigelow and John White, ought to be appropriated for public use, which they generously gave for the purpose of erecting a meeting house upon and for other necessary accommodations, and secured the same by deeds unto Ezra Beaman, Esq., Abel Bigelow, Ezekiel Beaman, Josiah Beaman and Samuel Estabrooks, acting in their behalf for the common benefit of the society. . . . From this time they formed themselves into a society, and the more readily to transact their business, as a part of the meeting at the schoolhouse near Reuben Keyes in December 17, 1792, they first chose David Goodale for their Clerk, second chose Joseph Estabrooks for a Moderator, third, Ezra Beaman, Abel Goodale, Ezekiel Beaman and Israel Moore, a committee for the purpose of managing their prudential affairs, which they denominate their Parish Committee. Fourth, voted to build a meeting house. Fifth, voted that it be set on or near the northerly part of Abel Bigelow's land. Sixth, Ezra Beaman, Ephraim Beaman and . . . chose a committee of ways and means so-called for the purpose of pointing out and securing necessary ways and roads. Seventh, Samuel Estabrooks, Ephraim Beaman, Josiah Beaman, Ezra Beaman and Israel Moore, chose a committee to secure land and lay out timber for a meeting house. Then the meeting was adjourned to the 31st instant at one o'clock P. M., at which time they again met, and the Committee on Ways and Means reported the expediency of a road from the meeting house to the new schoolhouse a little north of the same through Joseph Bigelow's land, and another from said spot to Ezra Beaman's through said Beaman's and Bigelow's land, and that they might be had free of expense except the building; a good well on each side of the road first mentioned, so far as it extends through said Bigelow's improved land to said first mentioned road being 4 rods wide

and the other 3. Second, the committee for the purpose exhibited a plan for a meeting house 58 feet long and 45 feet wide, which was framed 58x46, which was accepted. Third, voted to proceed to build the said house the year ensuing, and that Ezra Beaman, Ephraim Beaman, Abel Goodale and Joseph Beaman and Samuel Estabrooks be a committee to manage the work."

Deeds of the land in question were made and acknowledged by John White, Joseph Bigelow and Abel Bigelow in 1794, each in the following form:

"To all people to whom these presents shall come: Whereas divers persons, inhabitants of the towns of Boylston, Sterling, Holden and Worcester, having it in contemplation to make application to the Legislature of the Commonwealth of Massachusetts for the purpose of getting a parish incorporated and to erect and build a meeting house for public worship in Boylston in the county of Worcester, and have agreed to erect the same on a tract of land on the easterly side of the road leading from Captain Bigelow's to Lancaster; Now know ye that I, . . . of Boylston aforesaid, for divers good causes and considerations, me thereunto moving, as well as for the sum of five shillings paid by Ezra Beaman, Esq., Paul Goodale, yeoman and Ephraim Bigelow, gentleman, all of Boylston aforesaid, Josiah Beaman of Sterling and Samuel Estabrooks of Holden, yeoman, and all in the County of Worcester, the receipt whereof I do hereby acknowledge, do hereby give, grant, sell and convey unto the said Ezra Beaman, Paul Goodale, Ephraim Beaman, Josiah Beaman and Samuel Estabrooks and their heirs forever for the purpose of erecting a meeting-house and accommodating the same with a common, and for no other purpose, the following tract of land . . . (description) . . . To have and to hold the same to the above-named persons in trust for the use of the intended parish as aforesaid, and for no other purpose as aforesaid forever."

The deeds were not recorded until January, 1809, but the meeting house was built upon the land in question, and dedicated January 1, 1795.

By Chapter 10 of the Acts of 1796 certain lands in the towns of Boylston, Sterling and Holden, including the premises in question, were incorporated into a Precinct by the name of the Second Precinct in Boylston, Sterling and Holden. By act of January 30, 1808, said precinct was, through its own efforts and at its own expense, incorporated into the town of West Boylston. Both precinct and town meetings were held in the meeting house until it was destroyed by fire in 1831. The precinct in 1806 by vote set out rows of trees on the bounds of the Common and the town paid for the care of, and repairs to, the meeting house and also paid the minister's salary. In 1819 a Baptist church and society was formed. There is no record of a corporate organization, but land was acquired and a Baptist meeting house erected on land facing and abutting on the Common. The town continued to hold its meetings in the old meeting house, and in 1823 the town, by vote in town meeting and by deed received from one Temple, altered the boundaries of the Common by exchanging lands with said Temple who was an adjoining owner to the north, back of the meeting house.

In 1830 there occurred a division in the church, resulting in the organization of a Liberal or Unitarian Society. On March 8, 1830, a petition was addressed to a local justice of the peace by certain inhabitants of West Boylston to issue a warrant calling a meeting for the purpose of being organized into a religious society by the name of the First Liberal Society in West Boylston. The warrant was issued accordingly, and on March 18, 1830, the society was organized. The first meeting was held in the Beaman Tavern and thereafter at the Centre School House.

In the summer of 1831 the old meeting house burned down. The First Congregational Parish voted not to rebuild

on the Common, but instead to erect a meeting house down in the valley. This was done, and the meeting house so erected was thereafter locally known as the brick meeting house, the Church Society there worshipping retaining the name and organization of The First Congregational Society, and its correlative temporal body that of The First Congregational Parish of West Boylston. (See six paragraphs *infra*.) Meantime the Liberal Society, at a meeting on September 19, 1831, called to see what method the society would take to locate and build a meeting house, voted to build a meeting house on the old Common. This was accordingly done and the meeting house was erected substantially on the site of the old First Parish meeting house which had just been burned; the building being contracted for in March, 1832, and erected prior to March 18, 1833. In 1833 the town disposed of the bell and what other articles remained from the destruction of the old meeting house. In 1834 the Liberal Society was incorporated under the name of the First Liberal Congregational Society in West Boylston, and thereafter the Liberal Society meeting house was regularly used by that society for religious services for some thirty or forty years. After about 1875 it was used for services at irregular intervals only, and the building fell into dilapidated condition; but was painted and repaired to some extent from time to time by the neighbors and by private subscription among the citizens. About 1898, the site of the brick meeting house having been taken by the Metropolitan Water Board, the Liberal Society and the First Congregational Parish came together again as the present petitioner corporation; deeds were made, the old meeting house was torn down, and a new church building erected in its place on the old Common.

Meantime public streets were laid out across the Common dividing it into three portions; a triangular tract in front of the church building, another triangular tract between

Worcester street on the west and the cemetery on the east, and a generally rectangular parcel on the west side of Central street. A strip of the old Common along the extreme easterly side adjoining the burying ground was taken by the town for cemetery purposes, and no money was paid therefor. Except and unless for this taking, however, there is no evidence of any control exercised by the town over the Common since the erection of the meeting house of the Liberal Society. The Liberal Society voted at various times to care for "its grounds," and to "sell their grass on their common within their lines," and passed other votes in relation to protecting "their property."

The Common has always remained open and unfenced. The owners of estates abutting on the Common on the westerly and southerly sides have built houses facing the Common, and for over fifty years have used, as the sole means of access to their lands, a way leading from the public streets along and substantially parallel to the southerly and westerly boundary lines of the Common, and distant about forty feet therefrom, obtaining access thereto by crossing from their respective lots as occasion might require. This way has been used by the abutting owners, and by all persons having occasion to go to and from their respective estates, for all the ordinary purposes of a way, and has been, and is, the only means of access to such estates. The rest of the Common outside of the tract used in immediate connection with the meeting house, which is clearly defined by the driveways, has been used as a town common is ordinarily used.

The first question in this case is as to the effect of the 1794 deeds. It seems to me that they clearly effected a conveyance of the land in question to the individuals therein named as grantees in fee simple, but in trust. *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Met. 32; *Attorney-General v. Federal Street Meeting House*, 3 Gray

1, 48; *Wells v. Heath*, 10 Gray 17; *Solier v. Trinity Church*, 109 Mass. 1; *Old South Society v. Crocker*, 119 Mass. 1; *Packard v. Old Colony Railroad*, 168 Mass. 92. The nature of the trust was temporary, however, to provide for public worship "while getting a parish incorporated." It was not an active continuing trust as to which there should have been a provision "to preserve a succession in the trustees" as in *Old South Society v. Crocker*, 119 Mass. 1, and similar cases. No successors were needed or contemplated. The intent of the parties appears both from the deeds and from the vote. The grantees were acting solely as a committee of the inhabitants for the benefit of the precinct which was about to be formed. Their object was the formation of a new town or parish as a practical measure of common utility. They thought that the lands in question ought to be appropriated for public use for the purpose of erecting a meeting house and other necessary accommodations for the new territorial organization; but the owners generously gave the land for those purposes acting for the common benefit of the intended society. The trust was almost a naked trust to convey to the precinct as soon as it should be organized. It has been argued on behalf of the respondent Smith that it was a trust in the grantees and their heirs to hold for the benefit of the parish so long as it should be used for the purpose of a meeting house and Common and thereafter for the benefit of the heirs of the respective grantors. I am unable to find any such purpose, however, expressed in the deeds. I think the purpose plain, and that it must be assumed that the trustees fulfilled their trust and conveyed to the precinct after its organization. *Greenough v. Welles*, 10 Cush. 571.

The intent of the parties is also clear that the property was to be used for the public purposes of the new territorial organization, "for a meeting house . . . and a common." The most important use of a meeting house was for the con-

duct of religious services. That constituted only one use of the meeting house, however, as religion was only one, although at that time the most important, phase of ordinary communal life. There was not only no distinction between the church and state, but the average community was a single entity for every purpose for life. The worship of God, the holding of property, the ordering of affairs, and protection against the enemy, were all matters calling for common action at one meeting. In the early days one call and one set of records sufficed for all purposes. Later distinctions grew up, and the community life took on separate organization as to its several separate phases, and still later, not only were these separate phases represented by different persons, but they became separate corporations or quasi-corporate bodies; *Baker v. Fales*, 16 Mass. 488; *Brown v. Sudbury*, Land Court Decisions, p. 225, *ante*. This was true of the church as well as of the proprietors of common fields, municipal governments and militia organizations. At the time of the 1794 deeds the neighborhood in question was just gathering itself into the simplest form of local organization, forming itself out of the fringe of the four larger communities which cornered at this point, into a village or precinct having practically all the attributes and qualifications of a town except that of representation, and ready to become a town as soon as the development might warrant. At first, all of the meetings were held for all purposes under one call. Later, there were two calls, one for those qualified to vote in church matters, and the other for those only qualified to vote in town affairs. There was no church organization capable of holding property. Parish and church were one, and first the precinct, and later the town, exercised full control over the property in question, voting some of it (directly behind the meeting house) to John Temple. This strengthens the presumption of a grant from the trustees to the precinct. Of course, such a presumption is a pure fiction.

All fictions are imaginary whether legal or otherwise; yet the presumption that the trustees did that which they ought to have done is a perfectly normal one, whether it rest on a fictitious presumption or on estoppel.

The next question is as to the effect of the separation of the churches after the fire of 1831. The petitioner's contention has been that the majority members of the original church separated from the parish and went down into the valley and built the brick church, leaving the minority members, who subsequently became the Liberal Society, remaining and constituting the original church, and therefore retaining title to the property. This does not appear to be in accordance with the facts, however. In most of the cases resulting from the Liberal movement of that time (of which nearly all have been cited by either the petitioner or the respondents) the decisions of the court have generally turned upon the single question as to which body represented the original parish. Much to the disappointment of the ecclesiastical controversialists of the time, the courts refused to recognize the "church" as a property owning body, or to pass judicially on whether the Orthodox or Unitarian element constituted the true church in each particular case. The legal test adopted seems to have been simply "who owned the property," whether the seceding body constituted the majority or the minority, the Orthodox or the Liberal element. The cases are fully cited in the briefs. See *Stebbins v. Jennings*, 10 Pick. 172; *Baker v. Fales*, 16 Mass. 488; *Avery v. Tyringham*, 3 Mass. 160; *Brunswick v. Dunning*, 7 Mass. 445; *Burr v. Sandwich*, 9 Mass. 277; *Milford v. Godfrey*, 1 Pick. 91; *Medford v. Pratt*, 4 Pick. 221; *Woodbury v. Hamilton*, 6 Pick. 101; *Lakin v. Ames*, 10 Cush. 198. The leading cases may also be found with some pungent doctrinal commentary in Buck's Ecclesiastical Law. In the case at bar, however, the Liberal Society had been fully organized, though not incorporated, before the old

meeting house burned down, and was then considering what method the Society would take "for to provide for preaching." It already constituted as much a separate society as did the prior Baptist organization. When the First Congregational Society moved down into the valley and built there, title to the Common still remained in the town, being moreover a title which under the deeds of 1794 was held for purposes wider than those simply of religious worship. Then came the Eleventh Amendment to the Constitution in 1833, and the incorporation of the First Liberal Society in 1834.

Some confusion arises in this case from the way in which the terms "Church," "Society" and "Parish" have been used. It should not be forgotten, however, that originally the Church was solely and only the spiritual body, the temporal organization being the Society, and the Parish the purely territorial designation of a public corporation, governmental in character though religious in nature, and so far as church purposes were concerned, an equivalent or substitute for district, precinct, or town. At first every citizen had to be a church member, and all interests were the same. There finally came a time, however, when not only had Church and State become divorced, and the Church members grown to be but a small proportion of the general body of worshippers, but their interests differed so radically that it became necessary to confer corporate and property owning powers on the church itself. Acts of 1887, Chapter 404. So that now we have the "Church" calling itself the "Society" and the designation "Parish" limited to the business organization of the original first Congregational body, which is, however, the legitimate successor, in property rights as well as in name, to the original First Parish. While "parish" was originally a territorial designation, however, it early reacquired its normal significance of a religious division of the body politic, and poll parishes, consisting of particular persons rather than of a particular ter-

ritory, were created. They were "regularly set off" by public statute, however; and were not mere voluntary organizations either of Churches or Societies. Acts of 1718, Chapter 1; Acts of 1786, Chapter 10; *Minot v. Curtis*, 7 Mass. 441; *Milford v. Godfrey*, 1 Pick. 91, 98. After the separation of the town and parish I rule that the meeting house with the lands reasonably appurtenant thereto vested in the original First Parish, while the rest of the common remained in the town as a municipal corporation. *Stebbins v. Jennings*, 10 Pick. 171, 185; *First Parish v. Jones*, 8 Cush. 184.

There remains only the matter of easements. It is clear that on the facts in this case no rights can have been acquired in the public generally. The only possible question is with regard to the rights of way claimed by the various abutting owners as appurtenant to their respective estates. I think, however, that no such rights could as a matter of law be acquired under the circumstances in this case. The underlying principle of the acquisition of an easement by prescription is the same as that of a fee by adverse possession, namely: estoppel. It is very hard to say how the owner of the fee in the Common, whether parish or town, could have told when any person walked or drove on to it, whether he was there in the exercise of an undoubted right, or attempting to acquire a specific private easement by user, or what the owner could have done to stop it, if it had known. *McKay v. Spaulding*, 184 Mass. 140.

What would happen in the highly improbable event of a sale of the meeting house lot, or of the Common being sold or given up by the town, without the ways around the south and west sides being first laid out as public ways, need not be considered at the present time or in this case. See *Rawson v. Uxbridge*, 7 Allen 125; *Gordon v. Taunton*, 126 Mass. 349; *Sears v. Atty. Gen.*, 193 Mass. 551; *First Church*, Petitioner, Land Court Decisions, p. 209, *ante*.

In conclusion a quotation from Buck's Ecclesiastical Law may perhaps be pardoned. "Whatever further materials may remain in some of the old towns of the Commonwealth for these unwieldy suits, it is to be hoped that they may not appear in the courts, for judges have reason enough to regret, above all men, the ancient union between Church and State in Massachusetts."

Decree for petitioner to portion north of the driveways, and for the town, on motion for substitution, for the portion south of the driveways.

Sheehan & Cutting, for petitioner.

C. H. Sibley, H. L. Thompson, W. H. Whiting for respondents.

JANE G. ALLEN, PETITIONER.

Hampden, December, 1907.

Judicial Sale — Partition — Defective Notice — Confirmation.

Title in this case comes under a sale made by a commissioner appointed in partition proceedings in the Superior Court. In the order of sale notice was prescribed by publication, the last publication to be at least fourteen days before the sale. The affidavit of notice filed by the commissioner showed publication two days before the sale instead of fourteen days as prescribed by the order and the report of the commissioner referred to the affidavit. A decree reciting that said report had been examined and considered was entered, accepting the report and confirming and establishing the partition. There were in the case missing heirs upon whom no actual service was obtained, but for whom a guardian ad litem was appointed.

The sale by a commissioner under partition proceedings is, under the provisions of Revised Laws chap. 184, sec. 47, made conclusive only against parties to the proceeding. The more sweeping provisions of sec. 45 apply only to a partition in the Probate Court of the estate of a deceased person, which is an action in rem or quasi in rem. In either event the sale to be conclusive must be the sale ordered by the Court. Under the provisions of said sec. 47 a commissioner's sale shall be made after like notice as is required in a sale of land by an administrator; and with regard to an administrator's sale, compliance with the order of Court as to notice

is essential to the validity of the sale. *Thomas v. LeBaron*, 8 Met. 355.

It is argued on behalf of the petitioner, however, that there is a marked distinction between sales which are, strictly and properly speaking, judicial sales, and sales that are made merely in pursuance of an order of Court. When the law under which a sale is made requires it to be reported to the Court for confirmation, confirmation is necessary to its validity. Rorer, *Judicial Sales*, sec. 5, 106. Such a sale is a partition sale in proceedings in the Superior Court. Rorer, sec. 399; R. L., chap. 184, sec. 13; *Hall v. Hall*, 152 Mass. 136. In such a case the sufficiency of the notice and the fairness and regularity of the sale are the very matters heard, considered and passed upon by the tribunal which has full jurisdiction of the matter. Freeman, *Void Judicial Sales*, sec. 28. There is a vital distinction between failure to give notice as ordered of a petition, and similar failure in the subsequent publication of notice of sale. Non-compliance with the terms of an order for publication of citation may go to the very jurisdiction of the Court. Freeman, sec. 15-18; *Verry v. McClellan*, 6 Gray 535; *Baker v. Blood*, 128 Mass. 543. Where, however, the sale is within the jurisdiction of the Court, and the departure from the order of sale is one which might originally have been incorporated in the decree, the defect is cured by the order of confirmation, even if the invalidity or defect in the notice be such that the Court might, on objection made thereto, have refused confirmation because of it. Kleber, *Void Judicial Sales*, sec. 260-320. Confirmation cannot validate a void sale. Rorer, sec. 109; Kleber, sec. 401. But if there was a failure to comply with some direction of the Court which the Court had power to dispense with before the sale, it could dispense with it after the sale, and the confirmation must be accepted as an approval of the variation from the terms of the order as disclosed to the Court by the report. If the Court had

jurisdiction to prosecute the inquiry and to make the decision, its approval was an adjudication upon all questions pertinent thereto which were either passed upon, or could have been brought by the parties, had they so chosen, to the attention of the Court. It is the chief purpose of the requirement for confirmation by the Court, and the chief value of the decree of confirmation to the purchaser, that therein lies protection from any collateral attack upon the title grounded upon a condition of sale which the Court could, and by its decree of confirmation, did dispense with. Freeman, sec. 44. In the case at bar the Court might have ordered the notice given in the manner in which it was given, and with all the evidence before it that the notice had been irregular, it accepted the report and confirmed and established the partition. There seem to be no Massachusetts cases directly in point. A great quantity of authorities in other jurisdictions are cited in the sections of the text books above referred to, some of which sustain the text.

Decree for the petitioner.

ALFRED V. LINCOLN, TRUSTEE, PETITIONER.

Suffolk, February, 1908.

Trust — Jurisdiction of Probate Court — Life Estate and Remainder.

Title in this case comes in part under the will of one Fannie M. Lincoln as the owner of one undivided half thereof, who, after the payment of all her just debts, devised and bequeathed "all the rest, residue and remainder of all property, both real, personal and mixed, of which I shall die seized and possessed, to my son Walter, to have and to hold the same to and for his use and benefit, but for and during the term of his natural life only, with full right to take and use during his life as aforesaid all rents, profits and income thereof, but upon his decease leaving issue lawfully begotten, I devise and bequeath all the said property to such issue of my said son equally, share and share alike, the issue of any deceased child taking its parent's share by right of representation; but if my said son Walter shall die without lawful issue then I devise and bequeath all said property to my heirs-at-law and next of kin then living according to the laws of inheritance and distribution then existing, in the same manner as though I had survived to that date and then died intestate."

The will was duly probated, and thereafter one Chester R. Lawrence presented a petition to the probate court in the county in which the will had been probated, representing that the testator had given certain property by her said will to said Walter for his natural life, "and appointed no person trustee thereof in the meanwhile," and praying that he

be appointed trustee thereunder. Said Walter assented, and thereupon the petition was granted, letters issued, and bond with sureties was filed and approved. The trustee filed an inventory showing "personal estate, none; real estate (describing locus) \$5,000." Thereafter an attempt was made to place title to locus in the wife of said Walter by means of an executor's sale for payment of debts, and also through a sale made by the trustee under license of the probate court, and licenses were obtained, and deeds passed accordingly. The proceedings were attacked, however, by a creditor who filed a petition to revoke the license, and a bill in equity to have the conveyances set aside. Decrees favorable thereto were obtained, in the course of which the probate court affirmed its jurisdiction in equity to deal with the matter, and on appeal to the supreme court the decrees were affirmed by agreement of parties. Subsequently said Lawrence resigned and the petitioner was appointed trustee by the probate court in his place. The petitioner then applied to the probate court for a new license to sell, which petition is still pending. In none of the probate proceedings was a guardian ad litem appointed for possible unborn or unascertained remainder men under the will.

The examiner questions the petitioner's power to dispose of this estate in fee simple on the ground of lack of jurisdiction of the probate court, suggesting that under the will there is no trust, but merely a life estate with a remainder. A guardian ad litem appointed in this court for possible unascertained remainder men under the will, in a careful report, makes the same contention.

The general policy of the law is to uphold the jurisdiction of the courts, and this court is extremely reluctant to question the jurisdiction of the probate court. It is not advantageous that titles coming under probate proceedings should be open to attack in collateral suits, and to a considerable extent the legislature has modified even the small number of

cases in which such attacks could formerly be successfully made. Fuller, Probate Law, 2d Ed., p. 394-400; R. S. Chap. 83, Sec. 12, 13; Acts of 1891, Chap. 415, Sec. 4; R. L., Chap. 162, Sec. 2. Where the probate court has jurisdiction of the subject matter its decree cannot be attacked in collateral proceedings either as to the manner in which the power was exercised or as to lack or failure of notice to any of the parties. *Jenks v. Howland*, 3 Gray 536; *Pinney v. McGregory*, 102 Mass. 186; *Bassett v. Crafts*, 129 Mass. 513; *McKim v. Doane*, 137 Mass. 195; *Bonnemort v. Gill*, 167 Mass. 338; *McCooley v. N. Y., N. H. & H. R. R. Co.*, 182 Mass. 205; Fuller, Probate Law, p. 396; *Ferden v. Davenport*, Land Court Decisions, p. 167, *ante*. The probate court is, however, a court of peculiar and limited jurisdiction, and while its powers within that jurisdiction are very broad and not subject to revision by any other court, (the supreme court in revising probate matters acting not as the supreme judicial court of general jurisdiction, but as the supreme court of probate) they are absolutely dependent upon the existence of the jurisdictional facts. *Heath v. Wells*, 5 Pick. 140; *Jochumsen v. Suffolk Savings Bank*, 3 Allen 87; *Crosby v. Leavitt*, 4 Allen 410; *Aiken v. Morse*, 104 Mass. 277; *Conant v. Newton*, 126 Mass. 105. Nor where jurisdiction is lacking can it be conferred or aided by consent of the parties or the fact that they were actually before the court. *Sigourney v. Sibley*, 21 Pick. 101; *Conant v. Newton*, *supra*. Furthermore, in the case at bar it must be noted that the interests represented by the present guardian ad litem were not represented before the probate court, nor, so far as appears, was the question of its jurisdiction ever suggested to that court. The only matter on which it passed in regard to its jurisdiction was as to its powers in the equity suit. Neither can the decree of the supreme court affirming the proceedings in the probate court be deemed to even impliedly cover the question now in issue. That decree was by

agreement of parties. Where the court has jurisdiction over the general subject, but exceeds its powers or passes on matters not necessarily involved or not tried and determined before it, the decree may be attacked in collateral proceedings. *Bowdoin v. Holland*, 10 Cush. 17; *Jenks v. Howland*, *supra*; *Watts v. Watts*, 160 Mass. 464; Fuller, Probate Law, p. 395, and cases there cited.

In the case at bar it seems clear on the face of the will that there was no trust. Where there is a devise of personalty for life and the law imports a trust, or where there is a devise of a mixed fund and the duties of the trustee under the will are such that the power of conversion is clearly necessitated or contemplated, the power or the trust will extend over the real estate; *Dorr v. Wainwright*, 13 Pick. 328; *White v. Mass. Inst. of Tech.*, 171 Mass. 84, 96; *May v. Brewster*, 187 Mass. 524; but where there is simply a life estate and a remainder, even though there be in the bequest for life personalty as to which a trust will be implied and a trustee appointed, there is no trust as to realty. *White v. Sawyer*, 13 Met. 546; *Hooper v. Bradley*, 133 Mass. 303. There being no trust there is nothing to support the jurisdiction of the probate court, and therefore no removal of the title by operation of any statute into the trustee from the remainder men in whom it vested under the will.

The petitioner may secure an appointment by the probate court as trustee for sale under the contingent remainder statute, and the case may be continued to await such appointment; otherwise there must be an entry of petition dismissed.

So ordered.

HENRY A. WOOD ET AL., v. TOWN OF MILTON.

Norfolk, March, 1908.

Way — Public — Layout by Town — Validity — Statutory Requirements.

The question at issue in this case is as to the validity of the layout as a public street of a certain way called Lincoln Street, which runs through the property of the petitioners, situated in the town of Milton.

The premises for which registration of title is sought were a portion of a large tract of land which was owned in common by the petitioner Wood and the late Charles E. C. Breck, father of the other petitioners. In 1896 Messrs. Wood and Breck had a plan drawn and recorded in the Registry of Deeds, dividing their land into building lots, and providing for a private street called Lincoln Street, twenty-seven feet wide throughout its westerly portion and thirty feet wide throughout its easterly portion. The town claims to have laid out Lincoln Street in 1901 as a public way thirty-five feet wide over the site of the old private way, with five feet additional throughout the whole length of the road on the southerly side, and three feet additional along the northerly side of the westerly portion only. At the time of the alleged layout the land was owned, one undivided half by the petitioner Wood, who lived in Brookline, and the other half by the other petitioners as heirs of said C. E. C. Breck, viz: the Misses Alice and Mary Breck, who lived in Milton, and Mrs. Sarah Cooke, who lived in Philadelphia.

The petitioners say that no notice of intention to lay out the way was served in accordance with the provisions of P.

S., Chap. 49, Sec. 67, the statute then in force, upon the non-resident owners. The town in reply says that Miss Alice Breck was the authorized agent for the other owners within the meaning of Section 67 of the statute. If so, actual notice by her would seem to be sufficient, no matter how acquired, the object of the statutory requirement not being to lay down any particular arbitrary or technical method of procedure necessary to be followed by loosely constituted public bodies as an absolute prerequisite to the validity of a public improvement, but solely to insure that reasonable opportunity to a private citizen to be heard before any of his property or rights can be appropriated for public use, which is the essential requisite of "due process of law." Province Laws, Acts of 1727, Chapter 1; *Kean v. Stetson*, 5 Pick. 492; *Harrington v. Harrington*, 1 Met. 404; *Pickford v. Lynn*, 98 Mass. 491; *Lawrence v. Nahant*, 136 Mass. 477; *Beals v. James*, 173 Mass. 591; *Hurtado v. California*, 110 U. S. 516; *Hager v. Reclamation District*, 111 U. S. 701; *Paulsen v. Portland*, 149 U. S. 30. From her testimony it is clear that Miss Alice Breck was the duly authorized agent of her sister, Mrs. Cooke, but there is nothing to show that she was in any way the agent of Mr. Wood. She managed the Breck half of the property, but worked with Mr. Wood in regard to anything that might be necessary to be done in regard to the property as a whole. This notice of intention to lay out the road, directing notice to be given to abutters of the time and place where the Board would proceed to lay it out and hear the parties, was an absolute prerequisite to a valid layout. *Masonic Building Association v. Brownell*, 164 Mass. 306. As to one owner they were complied with; as to the other they were not. What then is the result as to the title to the land? Not much assistance is to be obtained from the reported decisions for the reason that they largely turn upon the particular form of action in each case. Certiorari proceedings are not a

proper form of action in which to try a technical question of validity, and if no injustice is done the petitioner, certiorari will not lie even if the notice was given to the wrong owner. Where a proceeding is practically one in rem the form of notice is immaterial. Where the real matter is practically a judgment in personam, like an assessment of damages, then the owner must be served in due form. *Hall v. Staples*, 166 Mass. 399; *Worcester Agricultural Society v. Worcester*, 116 Mass. 189. In this proceeding, whatever the rights between the several parties and the town in regard to damages or betterments, the only question with regard to the title is whether the land is subject to a public easement. In so far as the layout is valid as to one owner I think it must be deemed to be valid as against the land. There is a marked distinction in all of the decisions between cases where a specific tract is taken from a private owner on condemnation proceedings for a public purpose, and cases where a public improvement or right is being extended over a whole territory. It would be impracticable to make the validity of an entire taking for public purposes depend upon a strict notification of every part owner, whereby the whole public improvement might be jeopardized by a slip in the machinery as to merely one owner, and in proceedings of this sort, which are practically in rem, it is not necessary. So long as a part of each class are represented and have an opportunity to be heard, or, in other words, so long as the interests of the particular estate are represented or have an actual opportunity to be heard before the court or quasi judicial body having jurisdiction of the matter, the essential matter on which the validity of the taking depends has been covered. *Pickford v. Lynn*, 98 Mass. 491 at 496; *Brock v. Old Colony Railroad Company*, 146 Mass. 194; *Bonnemort v. Gill*, 167 Mass. 338.

A second objection made by the petitioners to the validity of the taking involves a matter which forms the sole question

at issue in another case now pending, namely, whether a failure to file the plan or description in the registry of deeds within sixty days after the vote, as provided by Chap. 134, Acts of 1898, R. L. Chap. 48, Sec. 97, invalidates the layout. In this case the plan was recorded within the statutory time, but the description was not. In the other case (*Beckford v. Town of Needham*), neither description nor plan was recorded within the sixty days. By chapter 117 of the Acts of 1904 it was provided that the location and laying out of all State highways are legalized and confirmed notwithstanding any failure to file a description and plan in the registry of deeds as required by the act of 1888, R. L., Chap. 148, Section 97. I think that, notwithstanding the language of the act of 1904, that statute must be regarded as one to cure a possible defect rather than a declaration that without it the locations were illegal and invalid. The important matter, and practically the only matter really necessary to the validity of a taking for street purposes is, that the owner shall have notice and an opportunity to be heard. He must not only know that it is proposed to take land from him, but a description and plan must, under the provisions of P. S. Chap. 49, Sec. 71, be filed with the town clerk so that both he and the inhabitants who are to vote upon the matter may have full and timely knowledge of it. "This regulation was manifestly not intended to prescribe a mere formality, but to lay down the indispensable conditions upon compliance with which the right of appropriating private property to public uses of this kind can lawfully be exercised. As one of the safeguards of individual rights against inconsiderate or capricious action on the part of municipal authorities, it establishes a rule to secure precision and exactness of description on the part of the selectmen as to the changes which they propose to make. It is material to the landowner to know exactly what portion of his land is to be taken, and to the voters to know exactly

what the proposition is upon which they are to decide." *Jeffries v. Swampscott*, 105 Mass. 535. See also *Blaisdell v. Winthrop*, 118 Mass. 138; *Fitchburg R. R. Co. v. Fitchburg*, 121 Mass. 132; *Masonic Bldg. v. Brownell*, 164 Mass. 306. The statute is explicit. No layout shall be established until this is done. The filing of the description and plan in the registry of deeds does not take place until after the taking has been made. The taking is made by the vote of acceptance. *Baker v. Fall River*, 187 Mass. 53. No proceedings and no rights in connection with the taking itself are affected in any way by the subsequent recording at the registry. It is a matter of convenience to the owner, to the public and to subsequent purchasers in examining the title to have this record, but there seems to be no reason why it should be essential to the validity of that which is already, for good or ill, fully accomplished. (Note:—And see *Bryant v. Pittsfield*, 199 Mass. 530.) And so the statutory requirement, unlike the other, is merely directory in its language, that the authorities making a taking shall within sixty days thereafter file in the registry of deeds a description and plan. The test as to what statutory provisions are mandatory and what directory in matters of public takings is practically the same as in takings and sales for nonpayment of taxes. The cases on tax proceedings are collected in *Robinson v. Church*, Land Court Decisions, p. 13, *ante*. A somewhat similar provision in regard to plans of railroad locations is construed in *Abbott v. N. Y. & N. E. R. R.*, 145 Mass. 450, and *Brock v. O. C. R. R. Co.*, 146 Mass. 194.

A final objection made by the petitioners to the validity of the taking is that at the town meeting of March 5, 1900, to which was submitted the layout of Lincoln Street as made by the Selectmen, the town voted in regard to the matter to "indefinitely postpone." The matter was again submitted to the town meeting of 1901, when a vote was passed accepting the location. The town argues that the vote to indef-

initely postpone was merely a vote to leave the matter for action at some future meeting. I do not think so, however. The vote is an unusual one in town proceedings, but, as pointed out by Mr. Crocker in his *Parliamentary Procedure*, the vote is one of rejection rather than one of postponement, and its form is not properly indicative of its use. The effect of the vote is equivalent in its results to a negative vote on the main question. Its moral effect is like a decree of dismissal without prejudice. The matter may be begun over again without the stigma of having been once rejected on its merits, but so far as the particular proceeding then in hand is concerned it seems to me that the matter is permanently ended. As said by Mr. Cushing in his *Manual*, it is a suppression of the question in such a manner that it cannot be renewed, like the continuance of a suit without day. As there seem to be no cases on this subject in the reports, and the other questions have been carefully argued, I have given them full consideration. On the last proposition however I rule that the vote of the town in 1900 to indefinitely postpone action on the layout by the selectmen was a final action by the town on the layout, and that the attempted acceptance by the town at the meeting of 1901 was therefore invalid.

Decree for petitioners determining Lincoln Street to be a private way, and the lines thereof to be as shown on the plan filed by them in this case.

C. F. Hall for petitioners.

A. R. Tisdale for respondents.

Note: This case went to the Supreme Court on the single question of the vote of March, 1900, and the above ruling was sustained. *Wood v. Milton*, 197 Mass. 531. A similar decision having been filed in the Beckford case on the matter of the failure to record the description and plan of taking within sixty days of the vote, exceptions were taken thereto and overruled in *Beckford v. Needham*, 199 Mass. 369.

ROBERT HAGGERTY *v.* JAMES KERRIGAN.

Norfolk, April, 1908.

*Mortgage — Right to Possession — Tenant in Possession
Acquiring Overdue Mortgage — Writ of Entry.*

This is a writ of entry to recover a certain parcel of land situated in Quincy. The demanded premises were owned on October 13, 1856, in fee by one Thomas Haggerty, who on that date conveyed them in mortgage to one Curtis to secure the payment of five hundred dollars in five annual payments of one hundred dollars each. The mortgage did not contain any power of sale, but it did provide that upon fulfilment of the condition therein named the said mortgage deed and promissory note thereby secured should be absolutely void, and that until default said mortgagee, his representatives or assigns, should have no right to take possession of the premises. Said Haggerty died in 1857 intestate, leaving a widow Nancy, and as his only heir a son, the demandant, then a minor of six years of age. The widow and her said son continued to live on the premises, and about two years later she married the tenant who also took up his home with her. The demandant continued to live at home with his mother and stepfather until 1868 when he left the demanded premises and has not lived on them since. The tenant and his wife continued in occupation of the premises until the death of the latter in 1893, and the tenant has continued to occupy them ever since. In 1857 the mortgage was assigned by Curtis to one Wilmarth and the mortgage notes endorsed by him to her order. In 1863 "the mortgage and note thereby secured" was assigned by Wilmarth

to one Hardwick in ordinary form, but the mortgage notes were not endorsed. In 1871 the mortgage, promissory notes, and debts and claims thereby secured were assigned by said Hardwick to the tenant, but without any endorsement of the notes. The original mortgage, instruments of assignment and promissory notes were, however, delivered to the tenant and by him produced in court. The last endorsement of interest on the notes is an endorsement of interest October 13, 1870. The tenant paid five hundred dollars for the assignment of the mortgage and notes. No payment has ever been made by the demandant on the principal or interest of the mortgage debt. Neither has any act ever been done by him in recognition of the mortgage. The demandant testified that he was told by his mother about 1865 that the mortgage had been paid. The tenant has never received any payment from anybody on said mortgage indebtedness. No statutory entry to foreclose said mortgage has ever been made.

The situation of the parties in this case is the reverse of that in the cases in which the tenant having already a mortgage title makes an entry for the purpose of foreclosure. In the latter case the tenant is in under his mortgage, and whether his entry be effectual for the purpose of foreclosure or not, is, if the mortgage be overdue, immaterial; he has the mortgage title, he is entitled to possession by virtue of its terms, and he is actually in. Whatever the rights of the mortgagor may be in equity, whether of redemption, or, if the mortgage has been actually paid, of cancellation, he has no legal title, and no legal right to possession which will support a writ of entry. *Parsons v. Welles*, 17 Mass. 419; *Bigelow v. Willson*, 1 Pick. 485; *Howe v. Lewis*, 14 Pick. 329; *Mayo v. Fletcher*, 14 Pick. 525; *Sherman v. Abbot*, 18 Pick. 448; *Cook v. Johnson*, 121 Mass. 326. Here the tenant was in possession without title when he took an assignment of the mortgage. The principle upon which the

rights of the demandant depend is the same however. The mortgage which his father gave was in form a deed absolute, subject to a strict condition; the condition was not fulfilled, and the tenant holds the legal title by assignment in due form. Whatever the rights of the demandant in other proceedings, statutory or equitable, he cannot maintain a writ of entry.

Judgment for the tenant.

E. H. Jose for demandant.

J. W. McAnarney for tenant.

HARLOW H. ROGERS, PETITIONER.

Suffolk, May, 1908.

*Tax Title — Assessment — Owner of Record — Holder of
Outstanding Tax Title not Released of Record.*

The single matter in controversy in this case is as to the validity of the assessment of the tax preliminary to the sale under which the petitioner claims title. The land in question had been owned by one C. B. H. Temple, a non-resident, who died in 1894, and whose will was probated in Middlesex County, but not in the County of Suffolk where the land lies. In 1897 it was assessed to said Temple and sold for non-payment of the taxes to Harlow H. Rogers. In 1901 the said tax title was redeemed by the executor under the Temple will, and a release duly given by Rogers which release was not, however, recorded. The fact of such payment appeared on the records of the Town Auditor, was also known to the Town Treasurer, and was by him communicated to the Assessors. In 1902 the taxes were again assessed to C. B. H. Temple and the land sold for non-payment thereof to the petitioner. The Master, to whom this case was referred, ruled and reports that the said sale was invalid for the reason that the property was not assessed either to the person in possession thereof, such person being the residuary devisee under the Temple will, or to the person appearing of record in the records of the County in which the estate lay as owner on the first day of May. The Master ruled that under the statute then in force, viz: — Acts of 1902, Chapter 113, the owner of record on May 1st, 1902, was

Rogers, not Temple. The petitioner duly excepted to that ruling, and contends that the owner of record was C. B. H. Temple.

The purpose of the statute is to provide a method at once simple and easy for the assessors, and reasonable and definite for the land owner, for the assessment of taxes upon land. The occupant can be readily ascertained by visiting the land, and the owner of record by looking at the records. The petitioner contends that the easiest and most natural records for the assessors to consult are their own; and that a title of record is not necessarily confined to a title of record in the registry of deeds. *Arnold v. Reed*, 162 Mass. 438; *Lancy v. Boston*, 186 Mass. 128. The matter seems to be expressly settled by the statute itself, however, so far as this particular case is concerned. Under the Public Statutes "for the purpose of assessing and collecting taxes the persons appearing *of record* as owners of real estate shall be held to be the true owners thereof." P. S. C. 11, Sec. 13. By Chapter 84 of the Acts of 1889 this statute was amended by striking out the words "of record as owners of real estate" and inserting in place thereof the words "in the *records of the county* where the real estate lies," etc. On the revision of the statutes in 1900 the phraseology was again altered to read "the person appearing *of record*." R. L. Chap. 12, Sec. 15. No explanation as to this change appears in the notes of the commissioners on revision. In 1902 the law was again amended by inserting after the word "record" the words "in the records of the county or of the district, if such county is divided into districts, in which the estate lies." Acts of 1902, Chap. 113, approved to take effect upon its passage, Feb. 25, 1902. The owner of record in the records of Suffolk County was Rogers.

With the legality, real value, or equitable rights attaching to his record title, the assessors as merely ministerial officers, had nothing to do. *Southworth v. Edmands*, 152 Mass. 203;

Hough *v.* Adams, 196 Mass. 290, 293. Lancy *v.* Abington Sav. Bank, Land Court Decisions, p. 26, *ante*; Roberts *v.* Welsh, 192 Mass. 278.

Exceptions to Master's report overruled.

Petition dismissed.

MARCUS M. RUSSEL *v.* GEORGE A. WARD.

Middlesex, December, 1908.

Condition — Personal to Grantor — Restraint on Alienation — Partial Restraint.

This is a petition for registration of title to a tract of land on Ward Street in the city of Newton. In 1849 there was granted to the Newton Aqueduct Co. certain reservoir and aqueduct rights in relation to a well on this lot of land, which were subsequently acquired by the city of Boston. In 1864 John Ward, the then owner of the lot, conveyed an undivided three-fourths interest in it to George K. Ward, Mary A. Paul and Emily W. Hyde. In 1867 all of the grantors conveyed the lot to one Wiggin, under whom the petitioner takes title, by a deed containing at the end of the description in the granting clause, the following provision: "The premises are sold with the following restriction, that the city of Boston have the right to a well located on said premises, and this conveyance is made subject to all such rights and the condition that said premises shall never be let or sold to any foreigner or any other than a native born American." John Ward and Emily W. Hyde, the heirs of Mary A. Paul, and four of the five heirs of George K. Ward have released to the petitioner any right, title or interest which they may have in and to the tract in question by virtue of the provision above quoted. The respondent, who is the sole remaining heir of the said George K. Ward, declines to execute such release and claims that said condition is still in full force, and applicable to the parcel of land which is the subject of this inquiry. The rights of the city of Boston therein have

long since terminated. The grantors in said Wiggin deed did not at the time that deed was executed own any land adjoining the lot in question, nor did said provision in regard to letting or selling the property form a part of any general scheme of improvement affecting this or other land in the neighborhood. The petitioner asserts that said provision is invalid as an attempted restraint against alienation.

The foundation of the rule against restraint on alienation lies purely in public policy. Gray, *Restraints on Alienation*, sec. 21; *Hawley v. Northampton*, 8 Mass. 3, 37; *Gray v. Blanchard*, 8 Pick. 283; *Winsor v. Mills*, 157 Mass. 362. In all cases in which the law interferes with private contracts or with private rights for the benefit of the community at large, whether under police power, the right of eminent domain, a statute of limitations, or however otherwise, the rule to be observed in regard to the allowance of such interference is necessarily one rather of degree than of any fixed standard. Such interference is to be jealously watched, and that is not to be allowed to public policy which is not necessary to the public interest, but nevertheless, all lands are necessarily held subject to such regulation as may be necessary to the welfare and government of the community at large. One of the most essential rules under our law under which private property may be held is that it shall not be so held as to prevent its being freely alienable. This rule is sometimes ascribed to the statute of *quia emptores*, but it clearly rests on the much broader foundation of general public policy. It is the same public policy which underlies the rule against perpetuities, and the rule for which Professor Gray contends so vigorously, although not in this Commonwealth successfully, against spendthrift trusts. The rule against restraint of alienation is analogous to, although almost the direct opposite of, the similar rules of public policy which impress on real estate for the benefit of the community certain limitations of ownership like dower and

homestead, which cannot be alienated except under certain prescribed forms and conditions, regardless of the wishes of the persons immediately concerned, or of instruments drawn by them by which, but for the matter of public policy, the makers would unquestionably be estopped. The rule is clearly one against restraints on general alienation; against withdrawing real estate from commerce. The application of it must, therefore, of necessity vary with the facts in each case. Reported decisions on the matter are surprisingly few.

A qualification as to alienation to certain particular persons is clearly good. Co. Lit. 223 b; *Gray v. Blanchard*, 8 Pick. 283; *Winsor v. Mills*, 157 Mass. 362. As to a restraint against all the world except certain particular persons, however, the decisions both in England and in this country are conflicting and at variance. The cases may be found collected in Mr. Gray's *Restraints on Alienation*, sec. 33 to 40; and see in particular *Doe d. Gill v. Pearson*, 6 East 173; *Attwater v. Attwater*, 18 Beav. 330; *In re Macleay*, L. R. 20 Eq. 186; *Rosher v. Rosher*, L. R. 26 Ch. Div. 801.

The rule in regard to the matter deduced by Sir George Jessel in the *Macleay* case is, whether the condition takes away substantially the whole power of alienation. Pearson, J., commenting in *Rosher v. Rosher* on the decision in *In re Macleay* thinks that by "substantially" Jessel really meant "absolutely," and that the rule against restraints on alienation so interpreted is too narrow. He says that the Master of the Rolls seems to have simply followed what he conceived to be the old rule, but that with all respect to Sir George Jessel, to the weight of whose opinion he gives the greatest deference, he himself is unable to find in Littleton what Jessel found there. He thinks that Jessel interpreted the rule as laid down by Littleton to be "does it take away all power of alienation," and that therefore Jessel held as to the restraint in *In re Macleay* that "being a limited restraint on alienation, the condition is good." For "substan-

tially" Pearson would read "practically." Prof. Gray thinks that a better rule than either would be, that a condition is bad if the alienation be restricted to a particular individual or a particular class; and in all of the reported cases except *Gandolfo v. Hartman* (*infra*) in which the restraint has been held bad, it is to be noticed that it was an attempt to restrain all except members of the grantor's or settlor's family. The "classes" considered in Mr. Gray's book are all of them classes of heirs. In the case at bar the classes considered are classes of citizens. The only case at all analogous to the one at bar that I can find is the case of *Gandolfo v. Hartman*, 49 Fed. Rep. 181, in the U. S. Circuit Court for the Southern District of California. That was a case of a covenant in a deed not to convey or lease the land to a Chinaman. The covenant was held void as contrary to public policy, in contravention of our foreign treaties, and in violation of the 14th amendment. For a severe editorial criticism of the decision in *Gandolfo v. Hartman* see 26 Am. Law Rev. 598.

When this case was first before me I expressed an opinion that while in terms a restraint against all the world except a particular class, yet in effect, because the particular class forms but a comparatively small part of the community, the restraint is really one which permits of general alienation except to the very small class of citizens who are not "native born Americans." On a careful reconsideration of the whole matter, however, I am satisfied that this is not so. Aside from the "foreigners" who in themselves constitute the largest portion of all the world, the class of American citizens who are not native born is, and was at the time this deed was executed, a very large one. The restraint would in certain sections of the country, and in certain portions of Massachusetts, notably in Boston, render the land inalienable in the general market and except to a restricted class. In certain parts of many of our cities it would render the

land “practically” inalienable altogether. On the whole, the condition seems to me to be void as a restraint against alienation.

I also think, however, that the clause in question is properly to be construed not as a common law condition but as a personal stipulation for the benefit of, and intended to be enforced only by, the original grantors. They had no land to which it was or could be made appurtenant. It is true that they used the word “restriction” in that part of the clause relating to the well right, and “condition” in that relating to the restraint on alienation, but the word “restriction” is used inartificially and incorrectly, and there is nothing to indicate that the word “condition” is intended to be used in its strict and technical meaning. The case seems to me to be within the class of cases represented by *Badger v. Boardman*, 16 Gray 559; *Jewell v. Lee*, 14 Allen 145; *Dana v. Wentworth*, 111 Mass. 291. And see *Clapp v. Wilder*, 176 Mass. 332.

Decree for petitioner.

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